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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 526

THE BALTIMORE AND OHIO RAILROAD COMPANY AND WESTERN MARYLAND RAILWAY COMPANY, PETITIONERS,

vs.

A. SPATES BRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 25, 1932

CERTIORARI GRANTED JANUARY 9, 1933

(37,223)

(37,223)

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF WEST VIRGINIA

Law. No. 351

A. Spate Brady, Plaintiff,

vs.

The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation, Defendants

Note by District Clerk.—Title of Court and style of case are omitted from balance of transcript of record.

Petition—Filed Feb. 6, 1930

Plaintiff, A. Spates Brady, for cause of action against the defendants The Baltimore and Ohio Railroad Company, a corporation, and Western Maryland Railway Company, a corporation, says:

1. Plaintiff is a citizen of the United States and the state of West Virginia, and resides and has his principal place of business at Elkins in the Northern District of said state.

[fol. 2] 2. Each of the defendant railway companies above named is a common carrier engaged in interstate commerce, maintaining offices and owning and operating railroads, the lines of which run through the Northern District of West Virginia, and each of the said defendant carriers is subject to the Act to Regulate Commerce, approved February 4, 1887, and the several acts amendatory thereof and supplemental thereto. Each of the defendants is now and during the period from October 14, 1922, to April 1, 1923, was engaged in the transportation of coal from mines on its lines in West Virginia to interstate destinations on its lines and the lines of numerous connecting railroads.

3. During the period above referred to, October 14, 1922, to April 1, 1923, plaintiff operated a coal mine located on

what is known as the Coalton Branch of the said defendant Baltimore and Ohio Railroad. Plaintiff's mine was intermediate to two mines of the West Virginia Coal & Coke Company, a competitor of plaintiff hereinafter referred to as the Coal Company, located at the end of the said branch, and between the said two mines and a third mine of the Coal Company located on the said branch. Plaintiff's mine was also adjacent to a fourth mine of the Coal Company located on what is known as the Norton branch of the Baltimore and Ohio Railroad.

4. Sometime prior to October 14, 1922, the defendant companies and the Coal and Coke Railway Company (owned and operated by defendant The Baltimore and Ohio Railroad Company) entered into an agreement whereby the said defendant Western Maryland Railway was granted trackage rights over the Coalton and Norton branches of the Baltimore and Ohio Railroad to reach and serve the mines of the Coal Company located on the said branches. The said agreement was in effect until April 1, 1923, and the trackage rights granted thereby were exercised throughout the period between the said dates. Pursuant to said agreement and in compliance with the said Act to Regulate Commerce, the said defendant Western Maryland Railway published and had in effect during the said period schedules naming rates for the transportation [fol. 3] of coal from the aforesaid mines of the Coal Company to interstate points on its lines and the lines of numerous connecting railroads.

5. The defendant railways each established and had in force throughout the period aforesaid rules and regulations governing the rating of coal mines, and the distribution of coal cars among the mines, on their respective lines. The period hereinbefore referred to was a period of coal-car shortage on the lines of the defendant railways. The rules and regulations aforesaid and certain rulings and decisions of the Interstate Commerce Commission required that, during such periods of coal-car shortage, the cars available for coal loading should be distributed pro rata among the mines in accordance with their ratings or their orders if less than their ratings. They also provided and permitted the operator of any mine

reached by two railroads to order 100 per cent or less of its rating from either of the said railroads, or to divide the orders between the two railroads in any way which the judgment of the operator dictated, provided the combined orders did not exceed 100 per cent of the rating of the mine; and the mine was entitled to receive its pro rata share of the available cars on the basis of such orders and to ship the coal loaded therein via the railroad which furnished the cars.

6. As a result of the trackage agreement and rate schedules hereinbefore referred to, the mines of the Coal Company acquired the status of mines located on and reached by two railroads, to-wit, the said defendant Baltimore and Ohio Railroad and the said defendant Western Maryland Railway, with the right to order and receive cars for coal loading from, and to ship coal via, either or both of the said railroads on the basis of such divisions of 100 per cent of the mine ratings as the judgment of the Coal Company dictated, and the Coal Company exercised this right during the period aforesaid.

The said trackage agreement and the said rate schedules of the Western Maryland Railway did not name plaintiff's mine, and plaintiff was denied the right to order and receive cars for coal loading from, and to ship coal via, either or both the said railroads as his judgment dictated during the said period.

[fol. 4] 7. Prior to and during the said period, plaintiff repeatedly requested the said defendant railways, and each of them, to accord his mine the status of one located on both the said railways with the right, subject to the applicable rules and regulations, to order and receive cars for coal loading from, and to ship coal via, either or both the said railways as his judgment dictated, but his said requests were denied.

Throughout the said period plaintiff filed written orders for cars with the said defendant Western Maryland Railway, but the said railway, although it daily honored the orders of the Coal Company for cars and daily placed cars for loading at the said mines, refused to honor plaintiff's orders for cars and with a single exception refused to place cars for loading at plaintiff's mine, whereupon

plaintiff filed orders for cars with, and received a reduced supply of cars from, the said Baltimore and Ohio Railroad.

8. Plaintiff further shows that the said discriminatory acts and practices of defendants in failing and refusing to accord his mine a status on both the said railways with the right, subject to the applicable rules, to order and receive cars for coal loading from, and to ship via, either or both the said railways as his judgment currently dictated, and the said discriminatory failure and refusal of the Western Maryland Railway to honor his orders for cars by placing cars for loading at plaintiff's mine, were unjust, unduly prejudicial and unlawful in violation of the said Act to Regulate Commerce and acts amendatory thereof and supplemental thereto.

9. Plaintiff further shows that, if he had been permitted to secure his allotment of cars from and to ship his coal via either or both the said defendant railways as his judgment dictated from day to day, he would have chosen the Western Maryland Railway and secured his entire quota of cars from that railway because it had a much better supply of cars available for distribution than had the Baltimore and Ohio Railroad; that if the Western Maryland Railway had honored his daily orders for cars, he would have shipped his entire output via the said railway; that his [fol. 5] orders and requisitions to the said railway entitled him to receive a total of 818.1 cars of an average marked capacity of 50 tons each; that he actually received a total of only 372.8 cars of such average marked capacity; that during the period involved, the railroads urged him to load all cars furnished as heavily as possible; that he loaded the cars he received to an average of 53.55 tons per 50-ton car and that he would have loaded the additional cars he should have received to the same average loading; that the public demand for coal at interstate markets reached by or via the Western Maryland Railway was such that he could have sold his entire output, including the additional output which he would have loaded in the additional cars to which he was entitled, at the same average prices at which he sold the coal actually produced; that but for the unlawful acts and practices of defendants he would have produced and sold the additional coal; that his loss of

profits on the additional coal he would have produced and sold, and his increased costs of mining and selling the coal actually produced and sold, aggregated the sum of $57,735.11, and that he is entitled to judgment against the said defendants for said sum, together with lawful interest which has accrued thereon since April 1, 1923.

10. In October, 1923, plaintiff caused to be filed with the Interstate Commerce Commisson a formal complaint, Docket No. 15270, against the above-named defendant railway companies, charging, among others, that the discriminatory acts and practices of the said defendant railways in failing and refusing to serve plaintiff's mine with cars, as hereinbefore described, were in violation of the said Act to Regulate Commerce and acts amendatory thereof and supplemental thereto, and praying an award of reparation for the damages which plaintiff sustained as a result of said unlawful acts and practices of the said defendant railways. Thereafter, the following, among other, proceedings were had in the said case, to wit:

(a) After due hearing and investigation, a Division of the Interstate Commerce Commission, to-wit, Division 5, on July 25, 1925, found and concluded that the said charges in plaintiff's complaint had not been sustained.

[fol. 6] (b) Thereafter, upon petition of plaintiff, the case was reopened for reconsideration by the entire membership of the Interstate Commerce Commission. In a report dated May 10, 1926, the entire membership of the said Commission, including Division 5 thereof, reversed the previous finding and conclusion of Division 5 aforesaid, and held, among others, that—

"Under the circumstances complainant (the said A. Spates Brady) should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads."

The Interstate Commerce Commission further found and concluded that the acts and practices of the defendant railways resulted in undue prejudice to plaintiff. The said

report of the said Commission is found in volume 112 of the Interstate Commerce Commission reports beginning at page 244, reference to which is hereby made, and a copy of which is hereto attached, marked Exhibit "A" and made a part hereof.

(c) Thereafter, upon petition of plaintiff, the said Commission set the case for further hearing with respect to the amount of the damages sustained by plaintiff as a result of the unlawful acts and practices of the said defendant railways. In its report on the said further hearing, the said Commission made and set out numerous computations which were the same as many of those which plaintiff presented at the said hearing and by which he arrived at the figure of $57,735.11 as representing the amount of his damages, and thereupon made the following findings on page 331 of its said report, to-wit:

"The excess mining costs, amounting to $9,238.14, plus the lost profits, amounting to $48,451.07, gives a total of $57,735.11, which complainant (plaintiff A. Spates Brady) claims is the amount of the damages which he sustained. [fol. 7] Defendants do not question the method or figures used by complainant (plaintiff) in this computation."

But on page 332 of its said report, the said Commission made the following, among other, findings, hereinafter collectively referred to as the mitigation of loss-setoff finding, to-wit:

"It is a familiar rule that a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss. United States vs. F. & G. Co., 236 U. S. 512; Warren vs. Wetmore, 105 U. S. 224; Western Real Estate, Trustees, vs. Hughes, 172 Fed. 206; Hall vs. Paine, 112 N. E. 153. That principle is applicable here. By reasonable action on his part in accepting defendant's 20-80 offer, complainant could have increased his production to the extent of 1,625 tons in October, 1,940 tons in November, 3,960 tons in December, 4,980 tons in January, 2,545 tons in February, and 1,485 tons in March. To this extent his damage was due to his own action and defendants can not reasonably be expected to compensate him therefor."

And on the same page, to-wit, page 332, of its said report, the said Commission made the following additional findings, hereinafter collectively referred to as the average loading finding, to-wit:

"Complainant also erred in computing the tonnage that he could have produced, if he had been allowed to avail himself of the Western Maryland's car supply, by using an average loading of 53.55 tons per car. Under the rules 50 tons is used in determining the daily car rating and is likewise used in the rules governing distribution to coal mines."

Thereupon, the said Commission made revised mathematical computations based upon the said mitigation of lost-setoff and average loading findings, and arrived at the sum of $12,838.31, as the amount of plaintiff's damages, and entered an order, dated February 28, 1929, directing the said defendant railways to pay unto plaintiff, on or before May 1, 1929, the sum of $12,838.31, with interest thereon at the rate of six per cent per annum from April 1, 1923, to-wit, $4,685.98, or a total sum of $17,524.29. The said report of the Commission is found in volume 152 of [fol. 8] the Interstate Commerce Commission's reports, beginning at page 327, to which reference is hereby made, and a copy of which said report is hereto attached, marked Exhibit B and made a part hereof. A copy of the said order of the Commission is hereto attached, marked Exhibit C and made a part hereof.

(d) Thereafter, various petitions and motions to reopen the case were filed with the Commission, and the Commission, by separate orders, denied the said petitions and motions, the last order being dated December 2, 1929.

(e) The defendant carriers, and each of them, have been duly served with a true copy of the said order of the Commission dated February 28, 1929, and although thereunto requested the defendants, and each of them, have failed and refused to observe the said order of the Commission dated February 28, 1929, and to make to plaintiff the payment therein required of them, and have failed, neglected and refused to pay said sum or any part thereof to plaintiff.

11. Plaintiff further shows that the said mitigation of loss-setoff and average loading findings made by the said Commission in its said report dated February 28, 1929, and

all findings and computations auxiliary thereof appearing in the said report, dated February 28, 1929, are beyond the power of the said Commission, are erroneous as a matter of law, and therefore null, void and of no legal effect.

On January 17, 1930, plaintiff caused to be filed in this Court a bill of complaint, Equity No. —, against the said Interstate Commerce Commission and the United States of America, in which bill of complaint it was alleged, among others, that the said mitigation of loss-setoff and average loading findings made by the said Commission in its said report of February 28, 1929, and all findings and computations auxiliary thereof appearing in the said report of February 28, 1929, are beyond the power of the said Commission, without warrant in law and null, void and of no legal effect; and praying (a) that the Judge of this Court call to his assistance two other judges, one of whom shall be [fol. 9] a Circuit Judge as directed by the Act of Congress known as the District Court Jurisdiction Act, approved October 22, 1913; (b) that this Court adjudge, order and decree that the said mitigation of loss-setoff and average loading findings and all the findings and computations auxiliary thereof contained in the said report of the Commission dated February 28, 1929, are null and void, and that the said findings be set aside and annulled; (c) that this Court issue an order directing the said Commission to reopen the proceeding in which the said report and order of February 28, 1929, was made, to reconsider the said mitigation of loss-setoff and average loading findings, and to make corrected findings and a supplemental order consistent with the order and decree of this Court, and (d) that this Court grant unto plaintiff such other and further relief as may be fit and proper.

12. Plaintiff further shows that he is entitled to recover judgment as and for damages from the defendant railways (a) the sum of $17,524.29, together with lawful interest thereon since May 1, 1929, in accordance with the said order of the Commission dated February 28, 1929, and (b) such additional sum as, when added to the said sum of $17,524.29 plus interest thereon since May 1, 1929, will make a total sum of $57,735.11 together with lawful interest on said total sum since April 1, 1923.

Wherefore, plaintiff brings this suit and prays judgment against defendants The Baltimore and Ohio Railroad Com-

pany and Western Maryland Railway Company in the total sum of $57,735.11 with lawful interest thereon from April 1, 1923.

Plaintiff further prays for his costs in this suit, including therein his reasonable attorneys' fees.

S. T. Spears, George T. Bell, Attorneys for Plaintiff.

Duly sworn to by Samuel T. Spears. Jurat omitted in printing.

[fol. 10] Note by District Clerk

Attached to the foregoing petition is a paper on which is written the following:

"We the Jury find for the Plaintiff a verdict for $63,048.60.

J. H. Conaway, Foreman."

And on the back of the foregoing petition is the following:

"We, the Jury, find for the Plaintiff, and assess his damages at Sixty Three Thousand Forty Eight Dollars and Sixty Cents.

J. H. Conaway, Foreman."

EXHIBIT "A" TO PETITION

A. SPATES BRADY

vs.

B. & O. R. R. et al.

Upon Petition

INTERSTATE COMMERCE COMMISSION

No. 15270

A. SPATES BRADY

vs.

BALTIMORE & OHIO RAILROAD COMPANY et al.

Submitted November 9, 1925. Decided May 10, 1926

[fol. 11] Acts and practices of defendants in according Western Maryland service to mines of the West Virginia Coal & Coke Company located on the Coalton

branch of the Baltimore & Ohio during the period from October 14, 1922, to April 1, 1923, while failing to accord similar service to complainant's mine located intermediate thereto found to have resulted in undue prejudice to complainant in the matter of car supply. To this extent previous findings in this case, 102 I. C. C. 19, reversed. Case held open to permit filing of petition for further hearing with respect to amount of damages.

George T. Bell for complainant.
Chas. R. Webber and Eugene S. Williams for defendants.

Report of the Commission on Reconsideration

By the COMMISSION:

Complainant mines and sells bituminous coal in his own name and in the name of the Mabie Coal Company. By complaint filed October 8, 1923, as amended, he alleges that the rates on coal, in carloads, from his mine at Mabie, W. Va., to destinations in other States reached by the Western Maryland, hereinafter called the Maryland, and its connections were and are unjust, unreasonable, and unduly prejudicial to complainant and his mine and his traffic, in that they exceeded the flat West Virginia basis of rates. He further alleges that the failure and refusal of defendants to serve his mine with cars and to interchange coal traffic from such mine to all interstate destinations reached by the Maryland and its connections, at some convenient point in the Elkins district of West Virginia, and to accord such traffic the flat West Virginia region basis of rates while according such service, cars, and rates to competing mines of the West Virginia Coal & Coke Company, hereinafter termed the coal company, has been and is unduly prejudicial to complainant and preferential of his competitor and subjects complainant to unjust discrimination, all in violation of sections 1, 2, 3 and 4 of the interstate commerce act. We are asked to require defendants to cease [fol. 12] and desist from the violations of the act complained of and to award reparation. The issues were made the subject of a hearing, and a proposed report by the examiner to which exceptions were filed by the complainant. Upon brief the prayers for relief under section 2 and para-

graph (3) of section 3 and all requests for future relief were withdrawn.

In the original report, 102 I. C. C. 19, division 5 found rates charged on coal, in carloads, from complainant's mine to Port Covington, Baltimore, Md., unreasonable and awarded reparation. It found that the allegation of undue prejudice in the matter of car supply was not sustained. Upon petition of complainant the proceeding was reopened for reconsideration on the present record.

Complainant's mine is located on a short spur leading off the Coalton branch of the Baltimore & Ohio, hereafter called the B. & O., less than .05 mile from Mabie, W. Va., and approximately 6.31 miles south of Norton, W. Va. It is intermediate to Coalton mine No. 1 and Mabie mine No. 6 of the coal company. These mines, in addition to Arianna mine No. 7 of the coal company are the only coal operations on the Coalton branch. Two other mines of the coal company, Norton Nos. 2 and 8, are located on what is known as the Norton branch of the B. & O. which leads off the Coalton branch about 0.48 mile south of Norton. The latter mine has never been operated. The Coalton and Norton branches of the B. & O. were formerly a portion of what was known as the Coal & Coke Railway.

The coals from complainant's mine and those of the coal company are of similar grade and complainant competes actively with the coal company in the sale of coal. Complainant's mine is and has been entirely dependent on the B. & O. for its car supply. The mines of the coal company prior to October 14, 1922, with the exception of Norton No. 2, were likewise entirely dependent upon the B. & O. for car supply.

On September 8, 1920, the B. & O., the Coal & Coke, and the Maryland entered into an agreement whereby the Maryland was given trackage rights over the Belington branch of the B. & O. from a connection near Belington, W. Va., to Norton, and thence over the Coalton and Norton branches so as to reach the mines of the coal company then in existence, or any others that might be opened by the [fol. 13] coal company during the life of the agreement. The pertinent portions of the agreement are as follows:

The Baltimore Companies hereby grant to the Maryland Company the right to operate engines, trains, and coal cars for a period of one year from the date hereof from the con-

nection near Belington over said tracks as indicated upon the plat attached, for the transportation of coal from the mines of the West Virginia Coal and Coke Company above mentioned, (Norton No. 2, Coalton No. 1, Mabie No. 6 and Arianna No. 7) and from any other mines opened or to be opened by said Coal Company on said Coalton branch or said Norton Extension, not exceeding forty (40) loaded coal cars per day, to be moved in not exceeding two trains each way per day.

Beginning one year from the date hereof and for a period of four years thereafter, the Baltimore Company hereby grant to the Maryland Company the right to operate engines, trains and coal cars from the connection near Belington over their tracks as indicated upon the plat attached, for the transportation of coal from the Norton Mine No. 2 of the West Virginia Coal & Coke Company, and from any other mines to be opened on said Norton Extension by said Coal Company and which can not be served by any other existing railroad facilities, not exceeding fifty (50) loaded cars per day, to be moved in not exceeding two trains each way per day.

The Maryland contracted with the coal company for 65 per cent of its fuel needs. The Maryland did not operate over or place any cars for loading at mines on the Coalton branch during the life of the agreement, but it did exercise and has since exercised its right under the agreement to reach Norton mine No. 2. It was originally planned to secure its fuel requirements from the latter mine. A witness for the Maryland testified that mine No. 2 was unable during the latter part of 1922 to meet its needs, and this necessitated the Maryland securing some coal from mines on the Coalton branch. Accordingly, on October 5, 1922, it was mutually agreed between the parties to extend the agreement dated September 8, 1920, so that it would become effective at once and continue until April 1, 1923. It was [fol. 14] further agreed that the Maryland had the right to move a maximum of 90 loaded cars per day from the mines of the coal company on the Coalton and Norton branches and that the Maryland would move empty cars received from the B. & O. at Monroe yards, near Norton, to mines ordering such cars from the B. & O. and return the cars when loaded to the B. & O., payment for such service to be agreed upon between the carriers. Complainant's cars

ordered from the B. & O. were handled in accordance with this agreement, except on a few occasions when the B. & O. performed its own service.

The complaint covers the period from September 1, 1922, to April 1, 1923. It is complainant's position that the acts and practices of defendants on and after October 14, 1922, when the Maryland began serving the coal company's mines on the Coalton branch, gave those mines the status of joint mines, namely, mines entitled to service by more than one carrier, and that his mine, being intermediate, was entitled to the same status and treatment.

In Ridge Coal Mining Co. vs. M. P. R. R. Co., 62 I. C. C. 259, we defined a joint mine as being one located on the rails of only one railroad but served by one or more additional railroads. In that case we also said:

* * * if a carrier extend its service by a trackage agreement to one mine on another line, it would be difficult, if not impossible, to justify a refusal to accord similar treatment to another intermediate competing mine located on the track over which it operated under the trackage agreement.

Under the car-distribution rules then in effect a mine served by two roads, if it confined its orders to one road, was permitted to order 100 per cent of its rating from that carrier. If it ordered cars from two carriers, it was permitted to order 75 per cent of its rating from each. See Fairmont & Cleveland Coal Co. vs. B. & O. R. R. Co., 62 I. C. C. 269. In Bell & Zoller Coal Co. vs. B. & O. S. W. R. R. Co., 74 I. C. C. 433, decided on December 11, 1922, we reversed the latter case, for reasons there stated, and found that a mine served by two carriers should not be permitted to order cars in excess of 100 per cent of its rating [fol. 15] from both roads serving it. It had a right to order its full rating from either of the roads, if it so desired. It also had a right to divide its orders between the two roads as desired, provided that the combined orders did not exceed 100 per cent of its rating.

Defendants contend that a joint-mine status was not conferred upon the mines of the coal company, because of an understanding which they had with the coal company to the effect that its mines were not permitted to order cars in excess of 80 per cent and 20 per cent of their rating from the Maryland and B. & O., respectively.

It is not necessary in the disposition of this case to determine whether or not the coal company was entitled to order its cars in conformity with existing car-service rules for joint mines and as to that we express no opinion. During a portion of the period covered by the complaint the rule was effective whereby a mine served by two roads was entitled to order as much as 75 per cent of its rating from either road or a total of 150 per cent from both roads. Except for approximately one week the coal company was restricted in its combined orders from both roads to 100 per cent of its rating. To offset this excess distribution the mines of the coal company were subsequently entirely eliminated from B. & O. distribution and from October 21, 1922, to the end of that month no cars were furnished by that line.

In his complaint complainant prays, in part, that defendants be required to accord to his mine treatment in service, cars, and rates to his mine similar to that accorded the mines of the coal company. Defendants contend that complainant was offered the same arrangement but he declined and can not therefore be heard to complain. Whether or not this is true and whether or not similar service was in fact offered complainant depends upon surrounding circumstances.

On October 27, 1922, the senior vice-president of the B. & O. wrote to the vice-president in charge of operation as follows:

Referring to the agreement made with the Western Maryland Railway whereby they have trackage rights to reach mines of the West Virginia Coal and Coke Com- [fol. 16] pany located on the Baltimore and Ohio's Coalton Branch:

The practical effect of this trackage agreement is to place these mines, for the purpose of car distribution, upon both the Baltimore & Ohio and Western Maryland Railroads, and as I understand the distribution rules, the operator might be entitled to an allotment of 75% of capacity upon each road. This was not the intent of this agreement, as I advised you in my memorandum of October 5th last that the West Virginia Company would look to the Western Maryland for the major portion of their

car supply, calling upon the Baltimore & Ohio only for cars required for coke and certain coal loading to points on or reached via the Baltimore & Ohio Railroad exclusively where they had certain contracts.

I am advised that customarily the West Virginia Company's westbound shipments have been on the basis of approximately 20% of their capacity, which I understand to be about 90 cars. I have accordingly agreed with Mr. Drennen that instead of taking as a base for car distribution 75% of their rated capacity that the Baltimore and Ohio will take 20% of mine capacity, or, say, 18 cars per day, as a base, these mines to be allotted such percentage of 18 cars as the percentage of all cars available in the region bears to the total percentage allowance for that region; that is, if we have a 60% distribution Mr. Drennen's company to receive 11 cars; if a 40% distribution his company to receive 7 cars, etc.

In connection with this agreement the supervisor of mine ratings for the B. and O. testified as follows:

Q. As I understand it, the number of cars which constituted the maximum which the Western Maryland was to be allowed to place, on the average, to these mines, was the number which the two railroads had considered constituted the business of the West Virginia Coal & Coke Company in the past via the Western Mayland, is that correct?

A. I rather think so, yes, about what they had been used to shipping via the B. & O.

Q. And the Western Maryland?

A. Well, yes, both ways, if you want to put it that way.

[fol. 17] Complainant testified in part as follows:

Q. Did you ever have this matter up with Mr. Byers, President of the Western Maryland Railway, and what was the occasion therefor?

A. In the latter part of October, 1922, Mr. Byers came to Elkins in his private car and I went to see him about the matter. I reviewed in detail the various efforts I had made to get treatment similar to that accorded the mines of the West Virginia Coal & Coke Company and told him how I

had been referred back and forth by the officials of his road and the Baltimore and Ohio. He listened very attentively to what I had to say, but would not say very much himself or volunteer any opinion regarding the situation. When I pressed him for some sort of an answer to my request for similar treatment, he finally stated that I should see Mr. Drennen, President of the West Virginia Coal & Coke Company. To this suggestion I replied that Mr. Drennen was not the President of the Western Maryland Railway and surely not running the railroad. Mr. Byers replied that the arrangement in effect at the mines of the West Virginia Coal and Coke Company was a contract arrangement brought about between Mr. Drennen and the Baltimore and Ohio Railroad and that if I wanted the same thing I would have to see Mr. Drennen.

* * * * * * *

Q. Did you follow Mr. Byers' suggestion and go to see Mr. Drennen?

A. Yes, I went right over to Mr. Drennen's office in Elkins and told him what Mr. Byers had said. Mr. Drennen stated that he was employed by the West Virginia Coal & Coke Company to get cars for his company and that that was the purpose of the arrangement so far as the West Virginia Coal and Coke Company was concerned. He further stated that he saw no reason why my mine should not be given a joint status and my being allowed to use that joint status in any way I saw fit.

It is clear from the above and other evidence of record that the arrangement whereby the coal company's car supply would be furnished by the Maryland and B. & O., respectively, in the proportion of 80 and 20 per cent was [fol. 18] adapted to the needs of the coal company based upon their past shipments. It is also clear that the arrangement was the result of conference and agreement with the president of the coal company. Similar consideration was not given complainant, but he was advised that cars would be supplied by both carriers only in the proportion of 80 and 20 per cent, as was done with the coal company. Can it then be said that the complainant was not subjected to undue disadvantage?

It is contended by defendants that the object of the agreement with the coal company was to give the Mary-

land a dependable source of fuel supply, but it is undisputed that the coal company also shipped commercial coal under the agreement.

There was much testimony that during this period there was a market for all coal which could be produced. There was also much testimony that the mines of the coal company were operating practically at capacity during this period and by reason of this were able to maintain a good supply of labor to the detriment of complainant due to inadequate car supply to the latter. Complainant testified that—

* * * I thought I was entitled to have my mine treated as a joint mine and to have the benefit of all the rights and privileges of a joint mine. I did not think that because the 20 per cent arrangement happened to suit the business of the West Virginia Coal and Coke Company, the same arrangement should be forced on me. The arrangement may have been satisfactory for the West Virginia Coal and Coke, as they had a fuel contract with the Western Maryland. It was not satisfactory to me because I was selling coal exclusively on the commercial market. An 80 per cent Western Maryland and 20 per cent Baltimore & Ohio might suit my business one day but not the next day, and in any event I did not think the Baltimore & Ohio had any right to even suggest that I should agree to order my cars and place my business on any arbitrary percentage basis simply because the Western Virginia Coal and Coke Company, for reasons of their own, were alleged to be willing to do the same thing. The mines of the West Virginia Coal and Coke Company have been given a joint status and on the basis of that joint status that company had entered into a fuel contract with the Western Maryland.

[fol. 19] My position was that my mine should be given a joint status and that I should be permitted to exercise my rights and privileges under such status in any manner I chose.

It was absolutely unpracticable to try to operate a mine under that condition. Your orders come in and you have to order your cars for shipment.

It is well established that a mine served by two roads enjoys advantages not possessed by a mine served by only

one road. The reasonable enjoyment of these advantages should be protected. We think also that carriers may not, by withholding their equipment or facilities, dictate or control the markets which a particular shipper shall seek or enjoy, while adapting their services to the needs of a competing shipper. In In Re Irregularities in Mine Ratings, 25 I. C. C., 286, we said:

* * * In the annually recurring period of shortage of coal cars there is a great demand for coal and, generally speaking, each mine, whether junction point or local, is able to sell all the coal it can mine and ship. If the junction-point mine, served by two lines, is permitted to assert its full capacity against each of those lines, it is able to secure 100 per cent of its needs whenever each of those lines has as much as 50 per cent car supply. * * * It would thus be able to work substantially full time, while the nearby local mine would be able to work only one-half or one-third time, and the result would be that miners and laborers would seek employment with the junction-point mine where they could work full time rather than with the local mine that was able to work but part of the time. This makes it impossible for the local mine owner to maintain an organization or to work his mine efficiently or economically, and imposes upon him an extra cost in the production of coal.

The same fundamental reasoning is applicable in the case before us. By fixing the proportion of car supply which the coal company would be furnished by the respecive carriers in conformity with its customary shipments and after conference with the president of the coal company these advantages were made available to the coal company. When [fol. 20] fixing the proportion of car supply which would be furnished by the respective carriers to complainant like consideration was not given, but he was offered arbitrarily and without regard for the requirements of his business that which had been arranged for his competitor after deliberation. Such service would not have been similar or on a basis of equality between the shippers. The complainant was subjected thereby to undue and unreasonable disadvantage. Under the circumstances complainant should have been permitted to divide his orders for cars to the

respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads.

Upon all the facts of record we find that the acts and practices of defendants whereby they accorded Maryland service to the mines of the West Virginia Coal & Coke Company located on the Coalton branch of the B. & O. during the period from October 14, 1922, to April 1, 1923, while failing to accord similar service to complainant's mine located intermediate thereto resulted in undue prejudice to complainant in the matter of car supply. To this extent the previous findings in this case are reversed.

We adhere to the previous finding that no undue prejudice in the car supply furnished complainant's mine prior to October 14, 1922, has been shown. We also adhere to the previous finding that the rate assailed was unreasonable and unduly prejudicial to the extent that it exceeded $2.84 per long ton; that complainant made the shipments as described and paid and bore the charges thereon; that he has been damaged to the extent of the difference between the charges paid and those which would have accrued under the rate which was found reasonable; and that he was entitled to reparation in the sum of $262.23, with interest.

The extent of complainant's damage, if any, resulting from undue prejudice in the matter of car supply during the period from October 14, 1922, to April 1, 1923, has not been proved and the amount of reparation due can not, therefore, be determined upon this record. The case will be held open for a period of 60 days from the service of this report to permit the filing of an appropriate petition for further hearing with respect to the amount of damages, if any, sustained.

[fol. 21] EXHIBIT "B" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 15270

A. SPATES BRADY

vs.

BALTIMORE & OHIO RAILROAD COMPANY et al.

Submitted July 13, 1928. Decided February 28, 1929

Upon further hearing, reparation awarded to complainant because of undue prejudice found in our former report, 112 I. C. C. 244, to have existed in the distribution of coal cars

George T. Bell for complainant.

Charles R. Webber and Eugene S. Williams for defendants.

REPORT OF THE COMMISSION ON FURTHER HEARING

By the COMMISSION:

Exceptions were filed by complainant and defendants to the report proposed by the examiner, and oral argument was had. Our conclusions differ from those proposed by the examiner.

Previous reports in this case appear in 102 I. C C. 19 and 112 I. C. C. 244. In the latter report on reconsideration we found, at page 251:

that the acts and practices of defendants whereby they accorded Maryland service[1] to the mines of the West Virginia Coal & Coke Company located on the Coalton branch of the Baltimore & Ohio Railroad Company[2] during the period from October 14, 1922, to April 1, 1923, while failing [fol. 22] to accord similar service to complainant's mine located intermediate thereto resulted in undue prejudice to complainant in the matter of car supply.

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[1]By "Maryland service" was meant car service by the Western Maryland Railway Company.

[2]Hereinafter referred to as the B. & O.

The case was held open to permit the filing of a petition for further hearing on the amount of damages, if any, sustained. Such further hearing has been had, and this report deals with the amount of damages.

During the period in question the Western Maryland operated over the Coalton branch of the B. & O. under a trackage agreement. A severe shortage of coal cars existed throughout such period. In this coal-producing district the percentage of orders for coal cars which were filled by the B. & O. was lower than the percentage filled by the Western Maryland. Complainant's mine was being served exclusively by the B. & O. He desired to order cars from the Western Maryland, and through verbal and written communications the matter was brought to the attention of B. & O. and Western Maryland officials. Complainant was informed that his competitors on the B. & O. Coalton branch were ordering 20 per cent of their car supply from the B. & O., and 80 per cent from the Western Maryland, and that a division of his orders on that basis would be acceptable. This proposition was rejected, as complainant desired to place orders for car supply with either or both carriers as he saw fit. At the hearing on damages, a witness for complainant denied that his mine was offered the 20-80 basis, but the contrary is clearly and repeatedly shown by testimony of the same witness at the first hearing.

In our report on reconsideration we found, at page 250, that "complainant should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads."

Complainant in fact ordered a 100 per cent supply of cars from the Western Maryland, but since that defendant would not honor his requisitions on that basis, he also placed his order with the B. & O.

The damage claims rest upon the theory that by reason of defendants' action complainant was precluded from [fol. 23] utilizing the car supply of the Western Maryland, and that losses were suffered in two respects, viz, (1) loss of profits on coal that could have been produced had additional cars been available, and (2) increased cost of producing the coal which was produced and sold.

During the period in question complainant's mine had a daily car rating of 10.2 for October, 10.7 for November, 11.3 for December, 12.6 for January, 12.7 for February, and 13.8 for March. The following statement shows percentages of cars available to cars ordered on the B. & O. and Western Maryland in the district[3] in which complainant's mine is located:

	B. & O.	Western Maryland
October, 1922	34.96	58
November, 1922	22.9	54
December, 1922	24.4	68
January, 1923	24	69
February, 1923	30.7	57
March, 1923	25.7	52

The cars ordered by complainant from the Western Maryland are excluded from the above computation. By including such cars in the total the Western Maryland percentages of cars available to cars ordered would have been 54.63, 48.95, 61.91, 61.12, 49.87, and 44.5 for the respective months. Complainant began to order cars from the Western Maryland on October 17. During the balance of that month and in the succeeding months of the period it ordered from that carrier 130, 252, 315, 288, and 291 cars, respectively. Based upon the revised percentages, complainant would have been entitled to receive from the Western Maryland 71 cars in October, 125.5 cars in November, 156 cars in December, 192.5 cars in January, 143.6 cars in February, and 129.5 in March, or a total of 818.1 [fol. 24] cars during the period. He actually received 5 cars from the Western Maryland and 367.8 from the B. & O., divided as follows: October, 25; November, 73; December, 58.2; January, 73; February, 65.5; and March, 78.1.

The cars furnished were loaded with an average of 53.55 tons of coal per 50 foot car. The tonnage claimed to have been lost, because of defendants' practices, is obtained by multiplying the number of additional cars which he would

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[3]This district is designated the Charleston district by the B. & O. and the Weaver district by the Western Maryland.

have received each month if the Western Maryland had honored his requisitions by 53.55 tons. This computation shows the tonnage lost to have been 2,463 tons in October; 2,811 tons in November; 5,237 in December; 6,399 tons in January; 4,182 tons in February; and 2,752 tons in March.

The coal produced at complainant's mine is a highgrade bituminous coal. During the period in question there was an unusually active demand for such coal, but because of car shortage complainant was unable to fill his orders. The unusual demand continued until March, 1923, when it abated to some extent, but there was sufficient demand to have taken care of all of the coal complainant could have produced during that month.

In computing the excess cost of the tonnage actually produced, which complainant claims he is entitled to recover, the mining costs were divided into fixed and variable charges. The fixed charges are those which are not affected by the tonnage produced, and include main-line track and timbering labor at the mine, drainage labor and fuel consumed in connection therewith at the mine, stable labor and supplies, foreman and mine-office expenses, supplies and maintenance, main-office expenses, 10 per cent annual depreciation of mine machinery and equipment, charged on a monthly basis, taxes and insurance, legal and engineering expenses, and sales expense. The variable charges include the following: Pick mining, driving, motor labor, dumping and shifting, switching, weighing, locomotive and ventilation fuel, royalty and liability insurance. The variable charges change with the amount of tonnage produced.

The following table, which is a partial reproduction of one of complainant's exhibits, contains data compiled from his books and records:

[fol. 25]

	October	November	December	January	February	March
Net tons produced	3,014.45	3,560.45	3,131.60	3,763.4	3,393.4	3,973.25
Total fixed charges	$2,598.43	$2,735.45	$3,617.70	$3,343.07	$2,837.19	$2,386.81
Total variable charges	4,056.08	5,088.71	4,316.59	5,285.13	4,532.76	5,165.17
Total cost	6,654.51	7,824.16	7,934.29	8,628.20	7,369.95	7,551.98
Fixed charges per ton	.8619	.7683	1.1555	.8882	.836	.6008
Variable charges per ton	1.3456	1.4292	1.3789	1.4044	1.3358	1.2999
Total cost per ton	2.2075	2.1975	2.5344	2.2926	2.1718	1.9007
Total realization	11,048.24	13,328.18	11,711.70	16,440.36	12,505.80	11,505.92
Realization per ton	3.665	3.743	3.735	4.369	3.685	2.896

[fol. 26] If complainant had received the additional cars to *to* which he claims he was entitled, he could have produced, at 53.5 tons per car, the following tonnage of coal:

October	November	December	January	February	March
5,477	6,371	8,369	10,162	7,575	6,725

Based upon such tonnages, the fixed charges per ton would have been reduced to the following:

October	November	December	January	February	March
$0.474	$0.429	$0.433	$0.329	$0.375	$0.355

The differences between these amounts and the fixed charges per ton on the coal actually produced measure the excess cost per ton which complainant contends was incurred because of defendants' unlawful practices. These differences are as follows:

October	November	December	January	February	March
$0.388	$0.339	$0.722	$0.559	$0.461	$0.246

The total excess mining costs of the tonnage actually produced were obtained by multiplying these amounts by the number of tons. So computed, these excess costs were as follows:

October	$1,169.61
November	1,206.99
December	2,261.02
January	2,103.74
February	1,564.36
March	977,42
Total	9,283.14

Complainant's method of determining the profits lost on unmined tonnage which could have been produced is to deduct the sum of the variable cost per ton of the coal actually mined and the fixed cost per ton of the total which could have been produced, from the average price per ton received for the former, and then multiply the differences by the number of additional tons which could have been [fol. 27] produced. So arrived at, the costs per additional ton would have been as follows:

October	November	December	January	February	March
$1.82	$1.858	$1.812	$1.733	$1.711	$1.655

Deducting the above amounts from the average prices per ton received for the coal actually mined, the profit per additional ton would have been as follows:

October	November	December	January	February	March
$1.845	$1.885	$1.923	$2.636	$1.974	$1.241

On this basis the profits lost were as follows:

October	November	December
$4,544.23	$5,298.73	$10,070.75

January	February	March
$16,867.76	$8,255.27	$3,415.23

or a total of $48,451.97.

The excess mining costs, amounting to $9,283.14, plus the lost profits, amounting to $48,451.97, gives a total of $57,735.11, which complainant claims is the amount of the damages which he sustained.

Defendants do not question the method or figures used by complainant in this computation. They contend, however, that complainant did not actually suffer any damages, because his mine had an inflated rating and received or was offered during the period involved more cars than it was entitled to receive. They also contend that the evidence offered in proof of the damages alleged to have been sustained is too indefinite to justify an award. They contend, further, that even if this evidence is sufficiently definite, we must take into consideration in mitigation of the damages the number of cars complainant would have received, had he accepted the 20-80 offer, described above and also in the former report, which defendants made to him.

Practically all of the evidence introduced by defendants is in support of their contention that complainant's mine was excessively rated, and that he received all of the cars to which he would have been entitled if it had been properly [fol. 28] rated. Under the rules and practices in effect during the period involved, all mines served by defendants were rated in the following manner: At the close of each working day a written report of the operations at the mine was furnished to a representative of the carrier on whose line the mine was located. This report showed, among other things, the amount of tonnage produced, the time consumed in production, the number of cars loaded, the amount

of tonnage awaiting placement of cars for loading, and the number of cars desired on the following working day. At the end of the month, a report, sworn to and compiled from the data in the daily reports, was furnished to the carrier's representative. The superintendent of mine ratings of the B. & O. assigned monthly ratings to the mines on its line, based upon the information in these daily and monthly reports. These ratings were for the succeeding month, beginning with the tenth day. Thus, the rating of a mine from November 10 to December 10 was based on its performance during October.

Although the ratings of complainant's mine are attacked, defendants made no showing as to the ratings of other mines in the district. Assuming inflation in the case of complainant's mine, the effect of such inflation upon his car supply would have been materially lessened or perhaps entirely overcome if the ratings of other mines within the district were also inflated. The duty of maintaining and applying just and reasonable mine ratings during periods of car shortage rests upon the carriers. While this would not in any way justify the rendering of incorrect reports by complainant, defendants can not properly, in view of their duty and in a proceeding such as this, attack the ratings established for complainant's mine without showing the situation as to other mines.

It is a familiar rule that a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss. United States vs. F. & G. Co., 236 U. S. 512; Warren vs. Stoddart, 105 U. S. 224; Western Real Estate Trustees vs. Hughes, 172 Fed. 206; Hall vs. Paine, 112 N. E. 153. That principle is applicable here. By reasonable action on his part in accepting defendants' 20-80 offer, complainant could have increased his produc-[fol. 29] tion to the extent of 1,825 tons in October, 1,940 tons in November, 3,960 tons in December, 4,950 tons in January, 2,545 tons in February, and 1,485 tons in March. To this extent his damage was due to his own action and defendants can not reasonably be expected to compensate him therefor. Complainant also erred in computing the tonnage that he could have produced, if he had been allowed to avail himself of the Western Maryland's car supply, by using an average loading of 53.55 tons per car. Under the rules 50 tons is used in determining the daily car

rating and is likewise used in the rules governing distribution to coal mines. Making the latter correction, the profit per ton, if complainant had been permitted to order 100 per cent of his rating from the Western Maryland, would have been as follows:

October	November	December	January	February	March
$1.831	$1.872	$1.905	$2.621	$1.961	$1.231

The difference between the tonnage which complainant could have produced by accepting defendants' offer and that which could have been produced, if he had been permitted to order his full rating from the Western Maryland, was as follows:

October	November	December	January	February	March
475	685	930	1,025	1,360	1,085

The application of the average lost profit per ton during the respective months to the tonnage shown gives a total of $10,612.82, which is the amount of profit lost by complainant because of defendants' unlawful practices.

Making the correction indicated above with respect to tonnage per car, the fixed charges per ton, if complainant had been permitted to order 100 per cent of his rating from the Western Maryland, would have been as follows:

October	November	December	January	February	March
$0.488	$0.442	$0.451	$0.3433	$0.388	$0.365

[fol. 30] If defendants' offer had been accepted and cars furnished on that basis, the fixed charges per ton would have been as follows:

October	November	December	January	February	March
$0.537	$0.497	$0.510	$0.383	$0.477	$0.437

and the tonnage produced would have been increased to the following:

October	November	December
4,839.45	5,500.45	7,091.60

January	February	March
8,713.4	5,938.4	5,458.25

Multiplying the difference between the fixed charges per ton on the two bases by the number of tons indicated for

the respective months gives an excess mining cost of $2,225.49. To this should be added the lost profit of $10,612.82, making a total of $12,838.31. This is the amount of complainant's damage for which defendants are jointly responsible. As before stated, defendants contend that the proof of damages is too indefinite to justify an award. However, after making the necessary corrections, the damages claimed have, we think, been proved with reasonable certainty, which is all that the law requires. Avella Coal Co. vs. P. & W. Ry. Co., 77 I. C. C. 731, 740.

We find that by reason of the undue prejudice found to have existed complainant was damaged in the total sum of $12,838.31, and is entitled to reparation in this sum with interest.

A motion filed by defendants at the time of argument that we reconsider their previous motion to reopen this case in order that evidence excluded by the examiner with respect to inflation of complainant's mine rating might be put in evidence is denied.

It appears that the B. & O. and the Western Maryland are equally and jointly responsible for the damages sustained by complainant.

An order giving effect to these findings will be entered.

[fol. 31] EXHIBIT "C" TO PETITION

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 28th Day of February, A. D. 1929

No. 15270

A. SPATES BRADY

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY and WESTERN MARYLAND RAILWAY COMPANY

Order

It appearing that on May 10, 1926, the commission entered its report in the above-entitled proceeding, and said

proceeding coming on for further hearing with respect to reparation, which further hearing has been had, and the commission having, on the date hereof, made and filed its report on further hearing containing its findings of fact and conclusions thereon, which report and the said report of May 10, 1926, are hereby referred to and made a part hereof.

It is ordered that the above-named defendants be, and they are hereby authorized and directed to pay unto the complainant, on or before May 1, 1929, the amount of $12,838.31 with interest thereon at the rate of 6 per cent per annum from April 1, 1923, as reparation on account of unduly prejudicial practices in the distribution to complainant's mine of coal cars for use in interstate commerce, and

It is further ordered that defendants' motion that we reconsider their previous motion to reopen this proceeding be, and it is hereby, denied.

By the Commission.

George B. McGinty, Secretary.

[fol. 32] In United States District Court

Law. No. 351—Elkins

Return of Service of Petition—Filed February 17, 1930

United States Marshal's Return

I hereby certify and return that on the 12th day of February, 1930, at Elkins, Randolph County, West Virginia, I served the Western Maryland Railway Company, a corporation, with this petition, by delivering to H. H. Kerr, Agent of the said Western Maryland Railway Company, a corporation, at Elkins, West Virginia, a duly certified copy of said petition and at the same time exhibited to him the original thereof.

The president, vice-president, secretary, treasurer, or person duly appointed by law to accept service of process for it, not found in my District.

Harry A. Weiss, United States Marshal N. D. West Va., by J. W. Koontz, Deputy.

Law. No. 351—Elkins

United States Marshal's Return

I hereby certify and return that on the 11th day of February, 1930, at Parkersburg, Wood County, West Virginia, I served the Baltimore & Ohio Railroad Company, a corporation, with this petition, by delivering to F. A. Carpenter, Agent of the said Baltimore & Ohio Railroad Company, a corporation at Parkersburg, West Virginia, a duly certified copy of said petition and at the same time exhibited to him the original thereof.

The president, vice-president, secretary, treasurer or person duly appointed by law to accept service of process for it, not found in my district.

Harry A. Weiss, United States Marshal N. D. West Va., by Hal M. Rapp, Deputy.

[fol. 33] In United States District Court

Appearance of Counsel for Defendants—Filed March 10, 1930

To A. C. Merrill, clerk of said court:

Please note my appearance as counsel for the defendants in the above styled case, this March 10, 1930.

E. A. Bowers.

In United States District Court

Demurrer on Behalf of The Baltimore and Ohio Railroad Company—Filed March 10, 1930

The defendant The Baltimore and Ohio Railroad Company, a corporation, demurs to the petition and each paragraph or count thereof filed in this action, and for grounds of demurrer says that said petition is not sufficient in law.

E. A. Bowers, Attorney for Defendant The Baltimore and Ohio Railroad Company.

In United States District Court

Demurrer on Behalf of Western Maryland Railway Co.—Filed March 10, 1930

The defendant Western Maryland Railway Company, a corporation, demurs to the petition and each paragraph or count thereof filed in this action, and for grounds of demurrer says that said petition is not sufficient in law.

E. A. Bowers, Attorney for Defendant Western Maryland Railway Company.

[fol. 34] In United States District Court

Demurrer Assigning Grounds on Behalf of B. & O. R. R. Co.—Filed March 12, 1930

Defendant The Baltimore and Ohio Railroad Company, a corporation, demurs to plaintiff's petition herein and for cause of demurrer says:

First. The demand or claim asserted in the petition is not on the award of the Interstate Commerce Commission mentioned in said petition nor for the recovery of the same but is for a different sum than the amount of the alleged award of the Interstate Commerce Commission and is for an amount largely in excess of the award of said Commission described by said petition, and no action, as described by plaintiff's petition, can be maintained by him.

Second. The plaintiff has no right of action as asserted in his petition to cause this Court of law to consider, review, revise or reverse the award of the Interstate Commerce Commission described by said petition, nor has this Court jurisdiction to consider, review, revise or reverse said award made by said Interstate Commerce Commission.

Wherefore defendant prays judgment of this Court whether it shall make other further plea or defense to said petition.

E. A. Bowers, Attorney for The Baltimore and Ohio Railroad Company, a Defendant.

In United States District Court

Demurrer Assigning Grounds on Behalf of Western Maryland Railway Co.—Filed March 12, 1930

Defendant Western Maryland Railway Company, a corporation, demurs to plaintiff's petition herein and for cause of demurrer says:

First. The demand or claim asserted in the petition is not on the award of the Interstate Commerce Commission [fol. 35] mentioned in said petition nor for the recovery of the same but is for a different sum than the amount of the alleged award of the Interstate Commerce Commission and is for an amount largely in excess of the award of said Commission described by said petition, and no action, as described by plaintiff's petition, can be maintained by him.

Second. The plaintiff has no right of action as asserted in his petition to cause this Court of law to consider, review, revise or reverse the award of the Interstate Commerce Commission described by said petition, nor has this Court jurisdiction to consider, review, revise or reverse said award made by said Interstate Commerce Commission.

Wherefore defendant prays judgment of this Court whether it shall make other further plea or defense to said petition.

E. A. Bowers, Attorney for Defendant Western Maryland Railway Company.

In United States District Court

General Issue Plea on Behalf of B. & O. R. R. Co.—Filed March 12, 1930

And the defendant The Baltimore and Ohio Railroad Company, a corporation, by E. A. Bowers, its attorney, comes and defends the wrong and injury, when, etc., and says that it did not promise in the manner and form as the plaintiff has above thereof complained against it; and this defendant further says that it is not guilty of the grievances

laid to its charge in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country.

E. A. Bowers, Attorney for Defendant The Baltimore and Ohio Railroad Company.

[fol. 36] In United States District Court

General Issue Plea of Western Maryland Railway Co.—Filed March 12, 1930

And the defendant Western Maryland Railway Company, a corporation, by E. A. Bowers, its attorney, comes and defends the wrong and injury, when, etc., and says that it did not promise in the manner and form as the plaintiff has above thereof complained against it; and this defendant further says that it is not guilty of the grievances laid to its charge in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country.

E. A. Bowers, Attorney for Defendant Western Maryland Railway Company.

In United States District Court

Order—Demurrers Overruled—Filed and Entered July 14, 1931

On this 14th day of July, 1931, came the parties by their attorneys, and the court having considered the demurrers to the petition heretofore filed in this case, doth overrule said demurrers.

Enter.

W. E. Baker, Judge.

[fol. 37] In United States District Court

Order—Jury Impaneled, Reporter Sworn, etc.—Entered July 22, 1931

This 22nd day of July, 1931, came the parties hereto—the plaintiff in person and by S. T. Spears and George T.

Bell, his counsel, and the defendant Baltimore & Ohio Railroad Company by Charles R. Webber, its counsel, and Western Maryland Railway Company by Eugene S. Williams and John F. Brown, its counsel. And thereupon the plaintiff replying generally to the plea of the defendant Baltimore & Ohio Railroad Company and to the plea of Western Maryland Railway Company, which pleas were filed herein on March 12, 1930, issues are thereon joined.

On motion of the plaintiff Kemble T. Manning, a competent reporter, was duly sworn in open court as the official court reporter in this case.

Thereupon came a jury, to-wit: William Talbott, Delbert W. Zinn, H. G. Glover, W. A. Schaeffer, John Conway, W. Scott Jackson, F. W. Brinkman, C. W. Marquess, E. C. Shaw, Goffe Wilson, Jefferson Pritt, and H. W. Bonner, twelve good and lawful men duly selected, tried and sworn as the law directs to well and truly try the issues joined and a true verdict render according to law and the evidence; which jury having heard the opening statements of counsel and the evidence adduced and the hour of adjournment having arrived, were adjourned over until nine-thirty tomorrow morning, to which time the trial of this case is continued.

NOTE BY DISTRICT CLERK

Court minutes showing continuance of the trial of this case were duly entered of record on July 23, 24, 25, 27, 28, 29, 30, 31, August 1, 3, 5 and 6th.

On the 4th day of August, the following minute of Court was entered of record:

[fol. 38] IN UNITED STATES DISTRICT COURT

ORDER—PLAINTIFF'S MOTION TO DIRECT A VERDICT OVERRULED

This 4th day of August, 1931, came again the parties hereto as on yesterday, and came also the jury heretofore impaneled and sworn in this case and as constituted on yesterday, which jury having heard the conclusion of the evidence on behalf of the parties were adjourned until tomorrow morning at ten o'clock.

Thereupon, the plaintiff, out of the hearing of the jury, moved the Court to exclude the testimony offered on behalf of the defendants and to direct a verdict in his favor, which motion being argued by counsel, and considered by the Court, was overruled by the Court; to which ruling of the Court the plaintiff excepted. And the hour of adjournment having arrived the Court was adjourned until tomorrow morning at ten o'clock to which time the trial of this case is continued.

IN UNITED STATES DISTRICT COURT

ORDER—VERDICT—Entered August 7, 1931

This 7th day of August, 1931, came the parties hereto and came also the jury heretofore impaneled and sworn in this cause and as constituted on yesterday, which jury heard the instructions of the Court and retired to their room to consider of their verdict and, after a time, returned into Court and upon their oaths say:

"We, the Jury, find for the plaintiff, and assess his damages at Sixty-three thousand forty-eight dollars and sixty cents.

J. H. Conaway, Foreman."

Thereupon the defendants moved the Court to set aside the said verdict of the jury as contrary to the law and evidence and as excessive, which motion being considered by the Court, was overruled and said defendants' exception thereto was saved to them and each of them.

Thereupon, the plaintiff moved the Court to make an allowance to him for attorney's fees in this case, which motion is taken under consideration by the Court.

[fol. 39] IN UNITED STATES DISTRICT COURT

ORDER—JUDGMENT—Filed and Entered Sept. 5, 1931

On this 5th day of September, 1931, came the parties by their attorneys and the plaintiff moved for judgment upon the verdict of the jury heretofore awarded, and the Court being of the opinion that the motion for attorneys' fees should be considered and passed upon at a later date and

the Court having heretofore overruled the defendants' motion to set aside the verdict of the jury, plaintiff's motion for judgment is sustained and to the action of the Court in sustaining said motion defendants and each of them except. It is therefore considered by the Court that the plaintiff, A. Spates Brady, recover of and from the defendants, The Baltimore and Ohio Railroad Company, a corporation, and Western Maryland Railway Company, a corporation, the sum of $63,048.60, that being the amount of the verdict of the jury, with interest thereon from the 7th day of August, 1931, the date of said verdict, until paid, and his costs. All questions arising on the motion of plaintiff for the allowance of attorneys' fee, are hereby reserved for the future order of the Court.

Enter.

September 5th, 1931.

W. E. Baker, Judge.

In United States District Court

Defendants' Notice, with Acceptance of Service, of Time and Place of Presentation of Bill of Exceptions—Filed December 2, 1931

To A. Spates Brady, plaintiff:

Please take notice that on Thursday, December 3rd, 1931, defendants will lodge in the Clerk's Office of the above Court at Elkins, West Virginia, for your inspection their narrative statement of the evidence in the above-styled suit which is contained in and made part of defendants' Bills of Exception, which will also then and there be lodged in [fol. 40] said Clerk's office for your inspection, and will on Monday, December 14th, 1931, before the Judge of said Court at the Courthouse of the United States at Elkins, West Virginia, move the said Judge or the said Court, if it is then and there sitting, to approve said narrative statement of evidence and to sign, seal and make said bills of exception part of the record in said suit on appeal.

Western Maryland Railway Company and Baltimore and Ohio Railroad Company, Defendants, by Eugene S. Williams, Charles R. Weber, E. A. Bowers, John F. Brown, Attorneys.

(On reverse side)

Within notice is hereby accepted this Dec. 2, 1931, for A. Spates Brady.

S. T. Spears, of Atty. of Record for A. Spates Brady.

In United States District Court

Assignments of Error—Filed Dec. 3, 1931

Come now The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, defendants in the above entitled action, and file their Assignments of Error in the record of said action and in the judgment therein, upon which errors they will rely upon their appeal from said judgment entered by the United States District Court for the Northern District of West Virginia on September 5, 1931; which assignments and specification of error follow:

1. The Court erred in overruling defendants' demurrers to plaintiff's petition by order of said Court entered on July 14, 1931.

[fol. 41] 2. The Court erred in permitting plaintiff to put in evidence the report of the Interstate Commerce Commission dated May 10, 1926, in I. C. C. Docket No. 15270, A. Spates Brady vs. The Baltimore and Ohio Railroad Company, et al., and the order of the Commission in the said proceeding dated February 28, 1929, for the limited purpose only of showing the findings of the Commission in its administrative capacity, as shown in said order and report; likewise the report of the Commission dated February 28, 1929, and its order of the same date, in the same proceeding, for the limited purpose of showing damages sustained by the plaintiff, growing out of the facts found by the Commission in its report of May 10, 1926, to the extent of $57,735.11 as of April 1st, 1923, including that portion of said report and order reducing the damages to $12,838.31.

3. The Court erred in refusing to permit defendants to introduce in evidence the report of Division 5 of the Inter-

state Commerce Commission in the same proceeding dated July 24, 1925; and in refusing to permit defendants to introduce in evidence that Commission's report and order dated February 28, 1929, for the limited purpose of showing the finding by the Commission that the plaintiff was offered 80% car supply from the Western Maryland and 20% from the Baltimore and Ohio and refused to accept the same, and by his refusal lost profits of $48,451.97; and in further refusing to permit defendants to offer said report and order of February 28, 1929, for whatever said report and order may show and for all relevant purposes; and in further refusing to permit defendants to offer said report and order, except that those portions thereof which showed that defendants had offered plaintiff 20% Baltimore and Ohio and 80% Western Maryland car supply should not be received in evidence.

4. The Court erred in holding and remarking to the jury that the Interstate Commerce Commission found that plaintiff was under no obligation to accept the cars offered him on the basis of 20% from the Baltimore and Ohio and 80% from the Western Maryland, and that the Commission further found for plaintiff to have done so would have clearly been a violation of law; also in refusing to correct said [fol. 42] statement in his general charge to the jury.

5. The Court erred in refusing to permit cross examination of the plaintiff on matters relating to the productive capacity of the mine and to the offer by defendants to plaintiff of 80% Western Maryland and 20% Baltimore and Ohio car supply by way of defense, on the theory that defendants had no greater latitude in developing matters of defense from the plaintiff on cross-examination than from plaintiff's witnesses.

6. The Court erred in permitting plaintiff to testify that he could have loaded the additional cars he received with an average of 53.55 tons of coal, whereas plaintiff's rating was determined on the basis of 50 ton cars.

7. The Court erred in permitting plaintiff to testify as to cars left standing over on certain days at the mines of the West Virginia Coal & Coke Company, the plaintiff admitting that those cars were charged against said company and further admitting that he did not know whether the

cars were for railroad fuel or were bad order cars; also in permitting plaintiff to testify that more cars were placed on certain occasions at the mines of the West Virginia Coal & Coke Company by the Western Maryland than were ordered, the evidence having shown that this was for the operating convenience of the Western Maryland, and to assure it an adequate fuel supply.

8. The Court erred in permitting plaintiff to show that the Baltimore and Ohio allowed shortages to accrue at plaintiff's mine on occasions, whereas the suit is based upon the failure of the Western Maryland to accord plaintiff car supply on the basis of 100% of his mine ratings.

9. The Court erred in refusing to permit defendants to introduce in evidence by their own witnesses' testimony and a letter from the Baltimore and Ohio Superintendent to plaintiff, showing that plaintiff was not legally discriminated against in that he was offered the same basis of car supply as was given his competitor, the West Virginia Coal [fol. 43] & Coke Company, that is, 20% Baltimore and Ohio and 80% Western Maryland car supply.

10. The Court erred in refusing to permit defendants to prove that, if plaintiff had accepted the car service offered him on the basis of 20% of his ratings by the Baltimore and Ohio and 80% by the Western Maryland, and had ordered his full rating, he could have received and shipped at the same freight rate 729.4 cars—in view of the fact that plaintiff actually received only 372.8 cars but would have been entitled to 810.5 cars if permitted to order his full rating from the Western Maryland, and claims as his damage the lost profits on the coal he would have shipped in the 437.7 cars additional he would have received if permitted to order exclusively from the Western Maryland.

11. The Court erred in refusing to permit defendants to introduce in evidence the certified official reports of C. W. Stuart and S. E. Hawkshaw, State Mine Inspectors of West Virginia, to the Department of Mines of that state, of the results of their examination of plaintiff's mine on September 9, 1919, January 20th, May 5th and August 13th, 1920, March 1st, 1921, January 7th, August 31st and November 17th, 1922, and February 8, 1923, showing the number of men employed and other characteristics of the mine affecting its

productive capacity; and in refusing to permit said witnesses to testify that the average production per pick miner in West Virginia is about 5¼ tons per day; also the conditions they found in Brady Mine on said inspections and in what respect conditions were less favorable for the high rate of production of coal per miner in plaintiff's mine than in the mines of the West Virginia Coal Company, defendants having shown elsewhere that the production in said mine averaged 12 to 13 tons per day during the best period.

12. The Court erred in refusing to permit defendants to prove that plaintiff's mine was inspected on June 5, 1923, for the purpose of checking the correctness of plaintiff's mine rating which had been established by the Baltimore and Ohio on the time reported to that defendant by plaintiff [fol. 44] in the aforesaid daily and monthly reports, and that as a result of said inspection made jointly by the Baltimore and Ohio Field Supervisor of Mine Ratings and plaintiff's Mine Superintendent, the existing rating of 14.2 cars was reduced to 7.2 cars, that plaintiff offered no objection to the revised rating and that said Mine Superintendent acquiesced therein and admitted that the revised rating of 7.2 cars was liberal; the Court further erred in refusing to admit in evidence the reports of said Field Supervisor of Mine Ratings to the Baltimore and Ohio of the conditions existing at said mine which formed the basis of the reduction of the mine rating; also in refusing to admit in evidence Baltimore and Ohio published bulletins for June and July, showing the revised rating of said mine, and showing that the ratings of the mines of the West Virginia Coal & Coke Company and other mines were not substantially changed as a result of inspections on or about June 5, 1923.

13. The Court erred in refusing to permit defendants to prove through plaintiff's Assistant Mine Foreman, H. O. Brandon, that plaintiff's mine could not produce more than 5 railroad cars per day; that on different occasions during the period involved the mine was unable to load 4 cars in 8 hours; that the only way the mine was able to load as many as 7 or more cars, which it did load on various occasions, was by having the coal previously stocked up in the mine cars and on the floor of the mine ready for loading; also that the mine could not and did not produce the coal shipped on numerous dates throughout the period involved in the

time reported by plaintiff to The Baltimore and Ohio Railroad Company in plaintiff's daily mine reports, on which said reports and the time therein reported as having been consumed in producing the coal plaintiff's mine ratings were fixed by said Baltimore and Ohio.

14. The Court erred in refusing to permit defendants to prove, through various miners who worked in plaintiff's mine during the period, how much coal the various miners then at work produced per day, and how much coal the mine produced per day when it started "clean" in the morning, without an accumulation of coal on hand from a previous day's work; and further in refusing testimony of the miners [fol. 45] that the mine could only load 3 to 4 cars per 8-hour day.

15. The Court erred in refusing to permit defendants to introduce testimony and exhibits showing errors in the mathematical computation of damages suffered by plaintiff, as set forth in the Commission's report of February 28, 1929.

16. The Court erred in refusing to permit defendants to introduce in evidence testimony and exhibit computations made from plaintiff's payrolls as to the time actually worked by plaintiff's "day men" at the mine, for the purpose of showing that plaintiff had greatly understated in his daily and monthly reports to the Baltimore and Ohio the time consumed in producing the coal in the mine and on the tipple.

17. The Court erred in refusing to permit defendant, Western Maryland, to prove that it stood ready to furnish car supply to plaintiff's mine if the Baltimore and Ohio, whose tracks afforded the only means by which the Western Maryland could reach plaintiff's mine, would permit the Western Maryland to do so.

18. The Court erred in permitting plaintiff to offer in rebuttal the testimony of witness Rowan as to how much coal he had produced in Brady Mine on one particular day long prior to the period involved in this suit; also in permitting plaintiff's Mine Superintendent to testify as to the amount of coal a single miner produced in Brady mine long prior to the period involved; also his estimated average production per miner at a time long prior to the period

involved; also in permitting plaintiff to testify how much coal a single miner produced in a particular period in a different part of the state at some undisclosed time. The Court further erred in permitting plaintiff to prove that on one particular day in the latter part of March he counted the men at work in the mine and found there were more than the payroll shows for that period.

19. The Court erred in admitting evidence by plaintiff that the mines of the West Virginia Coal & Coke Company [fol. 46] were furnished cars when plaintiff's mine was not, the evidence in the case showing that the greater part of the output of said mines was being supplied under contract as fuel coal for the Western Maryland.

20. The Court erred in not permitting defendants to develop on cross examination of plaintiff and his Sales Manager that plaintiff's mine became practically exhausted between the period involved in the suit and the date of the trial in this proceeding; that plaintiff had sold the remaining coal at profitable prices, and had not made allowance therefor in the damages testified to by him.

21. The Court erred in admitting testimony on plaintiff's behalf, from recollection, as to how much coal was shipped on various days from his mine in 1919 and 1920; and in refusing to permit defendants to show from the reports made by plaintiff to the Baltimore and Ohio what those actual shipments were.

22. The Court erred in refusing to admit in evidence plaintiff's daily and monthly reports for September, 1922, on which were based plaintiff's October mine rating.

23. The Court erred in admitting in evidence testimony of plaintiff that the Baltimore and Ohio from 1918 to 1924 issued various changes in their rules and regulations governing distribution of cars to coal mines, which evidence was designed to show that it was impossible for plaintiff to understand the requirements of the Baltimore and Ohio rules relating to the time to be reported to the railroad as consumed by the mine in producing the coal or on the tipple (for the purpose of rating the mine), which changes in the rules had to do with entirely different subject matters, as shown by the rules themselves introduced in evidence.

24. The Court erred in permitting plaintiff to offer in evidence the daily reports of Coalton and Mabie Mines and plaintiff's testimony that said reports showed that the West Virginia Coal & Coke Company had given in those reports, as the time spent on the tipple, the same number of [fol. 47] hours as was reported for the time spent in the mine producing coal, there having been no attempt to show that such was not the fact at those mines; and the Court further erred in not admitting testimony on behalf of defendants after said reports were received in evidence to show what was the rate of production per miner in those mines during the days covered by said reports.

25. The Court erred in refusing testimony on behalf of defendants by plaintiff's employees that on different occasions they heard plaintiff's time-clerk reporting by telephone from the mine to the Elkins office the hours spent in the mine or on the tipple on such days in producing the coal, and that the time so reported was about half of the actual time spent.

26. The said Court erred in refusing to charge the jury, in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 1, as follows:

"The Court instructs the jury that there is no evidence in the case legally sufficient to entitle the plaintiff to recover from the defendants, and their verdict must be for the defendants."

27. The Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 2, as follows:

"The Court instructs the jury that there is no evidence in the case legally sufficient to entitle the plaintiff to recover from the defendant, The Baltimore and Ohio Railroad Company, and their verdict must be for defendant, The Baltimore and Ohio Railroad Company."

28. The Court erred in refusing to charge the jury in accordance with defendant's prayer for an instruction, designated defendants' instruction No. 3 as follows:

"The Court instructs the jury that there is no evidence in the case legally sufficient to entitle the plaintiff to re-

[fol. 48] cover from the defendant, the Western Maryland Railway Company, and their verdict must be for defendant, the Western Maryland Railway Company."

29. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction designated defendants' instruction No. 4 as follows:

"The Court instructs the jury that the evidence in the case shows that the ratings accorded to plaintiff during the period covered by the petition, were inflated and excessive and therefore plaintiff can not recover."

30. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 5 as follows:

"The Court instructs the jury that from the evidence plaintiff's mine ratings were inflated and excessive during the period covered by the petition, and that defendant, The Baltimore and Ohio Railroad Company, was induced to fix said ratings as a result of plaintiff's understatement in the daily and monthly reports shown in evidence of the time spent in the tipple or in the mine in dumping the coal over the tipple, or in the mine in producing the coal shipped, as stated in said reports, and therefore plaintiff cannot recover and the verdict must be for the defendants."

31. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 6 as follows:

"The Court instructs the jury that if they find from the evidence that plaintiff's mine ratings were inflated and excessive during the period covered by the petition, and shall further find that defendant, The Baltimore and Ohio Railroad Company, was induced to fix said ratings as a result of plaintiff's understatement in the daily and monthly reports, mentioned in evidence, of the time spent on the tipple or in the mine in dumping the coal over the tipple, or in the [fol. 49] mine in producing the coal shipped, as stated, in said reports, the plaintiff cannot recover and their verdict must be for the defendants."

32. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' Instruction No. 7 as follows:

"The Court instructs the jury that under the rules of The Baltimore and Ohio Railroad Company governing the rating of coal mines and car distribution to such mines it was plaintiff's duty, in answering question AZ of the daily reports made to the Baltimore and Ohio Railroad Company, that is to say 'Total number of hours worked today (see paragraph "E") on the tipple', to report all of the time from the hour when the tipple started operation for the day until it ceased operation for the day without making any deduction for the time when the tipple was not in operation while awaiting arrival of coal from inside the mine; and in answering question BA of said daily reports, that is to say 'Total number of hours worked today (see paragraph "E") in the mine producing coal', it was plaintiff's duty to report all of the time from the hour when the mine operation started for the day until it ceased operation for the day, including such time as the miners remained in the mine placing props, laying track, and loading coal into mine cars after the tipple ceased working for the day, and also including the time spent while the mine was in operation in producing coal on days when no railroad cars were on hand for a subsequent day's loading into railroad cars."

33. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 8 as follows:

"The Court instructs the jury that it was plaintiff's duty, in stating the time spent on the tipple in dumping coal or in the mine in producing coal shipped as stated in the daily and monthly reports, to include all of the time spent while the mine was in operation in mining and loading said coal; [fol. 50] and the Court further instructs the jury that if they find from the evidence that some of the miners worked at night or at hours other than the usual working day, and when the mine was not in general operation, then it was plaintiff's duty to ascertain with reasonable certainty the amount of time so spent by such miners and to take such time into consideration and include a reasonable amount of

time therefor in the total time reported to the defendant, The Baltimore and Ohio Railroad Company, as having been spent in the mine in producing the coal for the various dates covered by the daily reports offered in evidence."

34. The said Court erred in refusing to charge the jury in accordance with defendant's prayer for an instruction, designated defendants' instruction No. 10 as follows:

"The Court instructs the jury that if they believe from the evidence in the case that plaintiff substantially understated the time spent on the tipple in dumping coal or the time when a substantial part of the pick miners were at work in producing coal reported to defendant, The Baltimore and Ohio Railroad Company, then plaintiff's mine ratings were inflated and excessive and plaintiff cannot recover."

35. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 11 as follows:

"The Court instructs the jury that if they believe from the evidence in the case more time was required in producing coal at plaintiff's mine than was required for dumping coal over the tipple, and that plaintiff reported in each of the daily reports offered in evidence the same time spent on the tipple as in the mine producing coal with the exception of the report for October 30, 1922, as to which day plaintiff reported one-half hour spent on the tipple and no time in producing the coal; and if the jury shall find from the evidence in the case that plaintiff reported only the tipple time for each day, except as above mentioned, instead of the [fol. 51] actual time spent by the day men and pick miners at producing coal for each day and also for a subsequent day's loading into railroad cars, the plaintiff did not comply with the rules of defendant, The Baltimore and Ohio Railroad Company, governing the rating of coal mines and car distribution to such mines in effect throughout the period covered by the petition and therefore by omitting to report all the time spent in producing the coal, plaintiff obtained an inflated mine rating and plaintiff cannot recover."

36. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designed defendants' instruction No. 12 as follows:

"The Court instructs the jury that the undisputed evidence in the case shows that plaintiff's mine ratings were fixed by the defendant, The Baltimore and Ohio Railroad Company, in accordance with its rules legally established upon the daily and monthly reports rendered by plaintiff to said Baltimore and Ohio Railroad Company and that if the jury shall find from the evidence that the time stated in the daily and monthly reports as having been spent in the mine in producing the coal shipped, as stated in said reports, was substantially less than the time actually spent in the mine in producing the coal, then plaintiff's mine ratings were inflated and plaintiff is not entitled to recover and their verdict must be for the defendants."

37. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 13 as follows:

"The Court instructs the jury that if they shall find from the evidence in the case that plaintiff's mine ratings were fixed by defendant, The Baltimore and Ohio Railroad Company, in accordance with its rules legally established upon the daily and monthly reports rendered by plaintiff to said Baltimore and Ohio Railroad Company, and if they shall further find from the evidence that the time stated in the daily and monthly reports as having been spent in [fol. 52] the mine in producing the coal shipped as stated in said reports was substantially less than the time actually spent in the mine in producing the coal, the plaintiff's mine ratings were inflated and plaintiff is not entitled to recover and their verdict must be for the defendants."

38. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 14 as follows:

"The Court instructs the jury that if they shall find from the evidence in the case that it was the practice at plaintiff's mine to stock up coal by loading the mine cars and getting the coal loose and ready for loading, for the next day's loading after the railroad cars on hand were

loaded, and that such time thereby consumed in stocking up coal was not reported in the daily and monthly reports to defendant, The Baltimore and Ohio Railroad Company, then such practice resulted in producing an inflated mine rating and plaintiff cannot recover."

39. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 15 as follows:

"The Court instructs the jury that if they shall find from the evidence in the case that plaintiff ordered either 94.1 railroad cars, as testified to by plaintiff, or 127.7 railroad cars, as testified to by defendants, fewer than his existing ratings entitled him to order from The Baltimore and Ohio Railroad, then this circumstance shall be taken into consideration by the jury in determining whether plaintiff's mine could have produced the tonnage claimed by plaintiff and if the jury find from the evidence that plaintiff's mine could not produce coal according to its rating, then plaintiff's mine rating was inflated and plaintiff cannot recover."

40. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 16 as follows

[fol. 53] "The Court instructs the jury that if they shall find from the evidence in the case that plaintiff's mine could not load as many as 10.2 railroad cars in October, 10.7 railroad cars in November and 11.3 railroad cars in December, in the year 1922, and 12.6 railroad cars in January, 12.7 railroad cars in February and 13.8 railroad cars in March, in the year 1923, all of said railroad cars having a capacity of fifty tons each, in a day of eight hours spent either on the tipple or in the mine producing coal, then plaintiff's mine rating was inflated and he cannot recover."

41. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 17 as follows:

"The Court instructs the jury that in determining the question whether plaintiff could or would have produced

and sold all of the coal which should have been loaded in the 818 cars which he claims he would have received from the defendant, the Western Maryland Railway Company, if he had been permitted to order cars exclusively from that defendant, they may take into consideration the fact that The Baltimore and Ohio Railroad Company had a materially lower percentage of car supply available than did the Western Maryland Railway Company and that under plaintiff's own admission in evidence he ordered 94.1 railroad cars, of fifty ton capacity, fewer from The Baltimore and Ohio Railroad Company than he could have ordered under his existing mine ratings."

42. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 18 as follows:

"The Court instructs the jury that there is no evidence in the case that plaintiff could have shipped more than fifty tons of coal in the cars of the defendant, Western Maryland Railway Company, and in computing plaintiff's damages, if any, the jury must disregard the evidence that plaintiff shipped 53.5 tons per car in the cars of defendant, [fol. 54] The Baltimore and Ohio Railroad Company."

43. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 19 as follows:

"The Court instructs the jury that even if the jury believe from the evidence that the car ratings of all or any mines of the West Virginia Coal and Coke Company were inflated and that such inflation was result of understatements in the daily and monthly reports of such other mines of the time consumed in dumping coal over their tipples, or in their mines in producing coal shipped, such inflated ratings of other mines would not excuse plaintiff in understating by his daily and monthly reports the time spent on his tipple in dumping coal or in his mine in producing coal, and if the jury believe from the evidence that by such understatements plaintiff procured an inflated mine rating from the defendant, The Baltimore and Ohio Railroad Company, the plaintiff has no right to recover and their verdict must be for the defendant."

44. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 20 as follows:

"The Court instructs the jury that the defendant Western Maryland Railway Company was in no way bound by the ratings accorded plaintiff's mine by the defendant Baltimore and Ohio Railroad Company during the period from October 17th, 1922, to April 30th, 1923, and inasmuch as plaintiff testified that he would have ordered cars only from the defendant Western Maryland Railway Company if he had been permitted to do so, the burden of proof is upon the plaintiff to show what mine ratings he would have been accorded by the defendant Western Maryland Railway Company; and there being no evidence in the case to show what such ratings would have been, there is no basis in the evidence upon which the jury can ascertain any dam- [fol. 55] ages for plaintiff and therefore its verdict should be for the defendants."

45. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 21 as follows:

"The Court instructs the jury that the defendant Western Maryland Railway Company was in no way bound by the ratings accorded plaintiff's mine by the defendant Baltimore and Ohio Railroad Company and if the jury are unable to determine from the evidence in the case what ratings plaintiff would have been accorded by the defendant Western Maryland Railway Company if he had been furnished railroad cars by said defendant during the period from October 14, 1922, to April 30, 1923, then there is no basis in the evidence upon which the jury can ascertain what damages the plaintiff suffered as a result of not receiving Western Maryland cars and their verdict must be for the defendants."

46. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 22 as follows:

"The Court instructs the jury that on the undisputed evidence in the case plaintiff's mine ratings were based entirely upon the daily and monthly reports made by plaintiff

to defendant, The Baltimore and Ohio Railroad Company; and the Court further instructs the jury that inasmuch as the facts pertaining to the time reported by plaintiff in his daily and monthly reports to The Baltimore and Ohio Railroad Company as having been spent in dumping coal over the tipple and in the mine in producing coal, were exclusively within the knowledge of the plaintiff, the burden of proof is upon him to establish that such time was correctly reported and if the jury believe from the evidence that the plaintiff has not shown by a preponderance of evidence that he did correctly report such time, then there is no evidence from which the jury can find that plaintiff's mine ratings were proper and their verdict must be for the defendants."

[fol. 56] 47. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 23 as follows:

"The Court instructs the jury that if they find for plaintiff any sum of damages, they shall not find, as part thereof, any interest thereon."

48. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 24, as follows:

"The Court instructs the jury that if they find for plaintiff any sum of damages, they shall not find as part thereof, any interest in excess of interest calculated at six (6) per cent from February 28, 1929.

Pennsylvania Railroad Co. vs. Minds, 244 Federal 53; 63 L. Ed. (U. S. 1039); 250 U. S. 368."

49. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 25 as follows:

"The Court instructs the jury that if they find for plaintiff any sum of damages, in no event can the jury allow interest at six (6) per cent on any sum in excess of $12,838.31, nor for any period prior to February 28, 1929.

Pennsylvania Railroad Co. vs. Minds, 244 Federal 53; 63 L. Ed. (U. S. 1039); 250 U. S. 368."

50. The said Court erred in charging the jury by modifying defendants' prayer for an instruction, designated defendants' instruction No. 6 by inserting therein the words "knowingly and falsely", thereupon giving to the jury in his charge said instructions as so modified by the court as follows:

"The Court instructs the jury that if they find from [fol. 57] the evidence that plaintiff's mine ratings were knowingly and falsely inflated and excessive during the period covered by the petition and shall further find that defendant, The Baltimore and Ohio Railroad Company, was induced to fix said ratings as a result of plaintiff's understatement in the daily and monthly reports, mentioned in evidence, of the time spent on the tipple or in the mine in dumping coal over the tipple or in the mine in producing the coal shipped, as stated in said reports, the plaintiff cannot recover and their verdict must be for the defendants."

51. The said Court erred in charging the jury by modifying defendants' prayer for an instruction, designated defendants' instruction No. 19 by inserting therein the words "falsely and knowingly" understating and by omitting therefrom the last clause thereof, and thereupon giving to the jury in his charge said instructions so modified by the court as follows:

"The Court instructs the jury that even if the jury believe from the evidence that the car ratings of all or any mines of the West Virginia Coal & Coke Company were inflated, and that such inflation was result of understatements in the daily and monthly reports of such other mines of the time consumed in dumping coal over their tipples or in their mines in producing coal shipped, such inflated ratings of other mines would not excuse plaintiff in falsely and knowingly understating by his daily and monthly reports the time spent on his tipple in dumping coal or in his mine in producing coal."

52. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 1 as follows:

"The Court instructs the jury that under the evidence in this case the plaintiff was entitled to service for the shipment of coal from his coal mine in question, from both the Baltimore and Ohio Railroad Company and the Western Maryland Railway Company, during the period from Oc-[fol. 58] tober 14, 1922, to April 1st, 1923, and as such he was entitled to order from either or both of said railroads a daily supply of coal cars up to the rating of his mine, as his judgment might dictate; the combined orders, however, not to exceed 100% of the rating of his mine, and it was the duty of said railroads to supply cars on said orders pro rata according to their available car supply; and you are further instructed that if you believe from the evidence in this case that the plaintiff did order cars from said railroads, or both of either thereof, in accordance with the rating of his mine, and that said railroads failed or refused to furnish cars under said order, pro rata according to the available car supply, then the defendants are liable for all damages, if any, sustained by plaintiff by reason of the failure to furnish said cars; and in fixing said damages the jury shall take into consideration the profits, if any, which plaintiff would have realized on coal which he could have sold and shipped in the cars not supplied, if the jury believe from the evidence that he could have sold and shipped said coal, and in addition thereto, the extra expense, if any, to which plaintiff was subjected in the mining of the coal, which he did mine, sell and ship, by reason of the failure to furnish said cars to which he may have been entitled; and that said damages, if any, so ascertained, would draw interest from the 1st day of April, 1923; and if the jury find from a preponderance of the evidence in this case that the plaintiff did sustain any such damages, then they shall calculate the interest at six per cent (6) on the said sum from the 1st day of April, 1923, up to the date of their verdict; and the total sum thus ascertained should be your verdict."

53. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 2 as follows:

"The Court instructs the jury that the plaintiff, as a matter of law, was under no obligation to accept or agree to a contract with the defendants that he be furnished at

his coal mine in question in this case, a car supply on the basis of 20% from the Baltimore and Ohio Railroad Company and 80% from the Western Maryland; but, that he [fol. 59] was entitled to have cars based upon his mine rating to be ordered by him from either or both railroads, as his judgment might dictate, the combined orders, however, not to exceed 100% of his mine rating, and he was entitled to receive on said orders his pro rata share of cars of the available car supply; and if the jury further believe from the evidence in this case, by a preponderance thereof, that plaintiff placed orders with the Western Maryland Railway Company for cars not to exceed the rating of his mine, and was refused cars by said Western Maryland Railway Company when they had cars available, and then placed said orders with the Baltimore and Ohio Railroad Company and received from said last name- company his pro rata share of cars according to its available car supply; but that if the said Western Maryland Railway Company had furnished cars pro rata, according to its available car supply, he would have received an additional number of cars; and if they further believe that plaintiff could have loaded and sold the amount of coal which could have been shipped in the said additional cars, then the defendants are liable to the plaintiff for such damages as resulted from such failure to furnish said cars; and under these circumstances plaintiff could not be charged, by way of an off-set against his damages, such profits as he could have made or such excess expenses as he could have saved had he agreed with said railroad companies to accept cars on said 20-80 basis.

And you are further instructed that notwithstanding the fact that the Interstate Commerce Commission, in making up its report of damages sustained by defendant, did allow as an off-set damages and expenses which would have been attributable to the cars which plaintiff would have received under the 20-80 agreement, yet you are instructed that the Interstate Commerce Commission in making said deduction, if you believe as aforesaid that the plaintiff did in fact place his orders with the Western Maryland Railway for the cars in question, was without any authority of law for making said deduction and the jury, under this state of -acts and circumstances as herein conditioned, should disregard any such off-sets as may have been allowed or made by the Interstate Commerce Commission."

[fol. 60] 54. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 3, as follows:

"The Court instructs the jury that under the evidence in this case the acts and practices of defendants in according Western Maryland service to the mines of the West Virginia Coal and Coke Company in conformity with the business of the said Company during the period from October 14, 1922, to April 1, 1923, while failing to accord such service to plaintiff's mine in conformity with his business during the same period, subjected plaintiff to undue and unreasonable prejudice and disadvantage in the matter of car supply; that during the said period plaintiff was entitled to place his orders for cars with either or both the Western Maryland or Baltimore and Ohio Railways as his judgment dictated, provided his total orders did not exceed one hundred per cent of the rating of his mine, and that, therefore, he was entitled to place orders for cars not in excess of one hundred per cent of the rating of his mine with the particular road having the larger supply of cars available for distribution, viz: the Western Maryland Railway, and that plaintiff was entitled to receive his pro rata share of the cars from said Western Maryland Railway in accordance with the supply of cars which the said railway had available for distribution."

55. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 4 as follows:

"The Court instructs the jury that during the period covered by this case the law required the defendant railroad corporations to maintain and apply just and reasonable ratings of the coal mines served by their respective lines; that the ratings fixed by the Baltimore and Ohio Railroad Company for plaintiff's mine are presumed to have been just and reasonable; that the said ratings of plaintiff's mine are binding upon and cannot be impeached by defendants for any reason whatsoever in this case, except upon [fol. 61] the ground that plaintiff knowingly and fraudulently furnished to the Baltimore and Ohio Railroad Com-

pany false reports for the purpose of obtaining an unlawful rating of his mine and that said reports, without the knowledge of that defendant that they were false, in fact secured to plaintiff an unjust an- unreasonable rating of his mine; that the burden of proof rests upon defendants to prove clearly by a preponderance of the evidence that plaintiff did knowingly and fraudulently furnish false reports which, without the knowledge of the defendants, resulted in giving plaintiff's mine an unjust and unreasonable rating."

56. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 7 as follows:

"The Court instructs the jury that the plaintiff, in applying the rules of the defendant railroad companies relative to the rating of his mine and the reports furnished by him pursuant to said rules, had the right to construe the terms 'Hours worked in the mine producing coal', and 'Hours worked', in a way which was capable of practicable application to this mine and fair and reasonable, and the further right to consider the custom and practice of other mines in the same general region on the same railroad and subject to the same rules, and if you further believe from the evidence in this case that plaintiff did so operate his mine and make his reports, then the rating of his mine as fixed by the Baltimore and Ohio Railroad Company is binding upon the parties."

57. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 10 as follows:

"The Court instructs the jury that under the tariffs and rules of defendants which were in effect during the period involved in this case, plaintiff was privileged to load the cars placed at his mine to a maximum of ten per cent above their marked capacity, and he would have been privileged to load the additional cars, if any, which should have been [fol. 62] placed for loading at his mine, to a maximum of ten per cent above their marked capacity, and you are fur-

ther instructed that the said tariffs and rules were published and maintained by defendants pursuant to a statute of the United States and were, and are, therefore binding upon the defendants in this case."

58. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 11 as follows:

"The Court instructs the jury that if you believe from the evidence that defendants failed or refused to furnish plaintiff with the cars to which he was entitled by virtue of the orders which he placed with the Western Maryland Railway, and that the cars to which he was entitled by virtue of said orders were greater in number than the cars which he was actually furnished, then the defendants are liable for any and all damages sustained by plaintiff as a result of his not receiving the said additional cars; and in computing the said damages, you shall take into consideration the profits, if any, which plaintiff could have realized on coal which he could have sold and shipped in the said additional cars, if you believe from the evidence that he could have sold and shipped said coal; and in addition thereto, the excess cost, if any, which plaintiff incurred in producing the coal which he did mine, sell and ship, as a result of his not receiving the said additional cars; and if you find from a preponderance of the evidence that the plaintiff did sustain any such damages, then you shall calculate interest at six per cent (6%) per annum from April 1, 1923, to the date of your verdict on the total amount of damages so ascertained, and the sum of the damages and interest shall be your verdict."

59. The said Court erred in that specific part of said Court's charge to the jury, which instructs the jury that they should find interest at 6% from April 1, 1923, up to the date of the verdict of the jury if they should find for plaintiff.

[fol. 63] 60. The Court erred in that specific part of said Court's charge to the jury which instructs the jury that if a majority of the jury were in favor of one party and a minority were in favor of the other party, that the minority should yield to the majority if they could conscientiously do so.

61. The Court erred in overruling defendants' motion to set aside the verdict, and in entering judgment for the plaintiff on said verdict.

Eugene S. Williams, Charles R. Webber, E. A. Bowers, John F. Brown, Counsel for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER—MOTION TO SIGN BILL OF EXCEPTIONS AND OBJECTIONS SUBMITTED TO COURT, ETC.—Filed and entered December 14, 1931

On this December 14th, 1931, came again the parties by their attorneys, and defendants, by counsel, moved the Court to sign and make part of the record herein their bills of exceptions which were exhibited and presented in Court to plaintiff's counsel on December 3rd, 1931, at which time objections were made thereto by plaintiff, and in support of said motion defendants filed the affidavit of John F. Brown and the affidavit of E. A. Bowers, of counsel for defendants, to which motion plaintiff, by counsel, objected in writing and filed affidavit of S. T. Spears; and the Court having heard argument of counsel, said motion and affidavits and said objections are submitted to the Court; and counsel for plaintiff hath leave to file brief or briefs herein on or before Saturday, December 19, 1931, and counsel for defendants hath leave to file additional briefs herein or before December 26, 1931.

Enter.

W. E. Baker, Judge.

[fol. 64] IN UNITED STATES DISTRICT COURT

OBJECTIONS TO SIGNING BILL OF EXCEPTIONS—Filed December 14, 1931

The plaintiff objects to the court signing any Bills of Exceptions in this action because the term of court at which the judgment in this action was rendered expired on the 16th day of November, 1931, and there is no standing rule

of the court extending the date beyond the adjournment of a term of court for the purpose of signing Bills of Exceptions, and no order was entered by the court during the said term extending the time beyond the expiration of said term within which to sign Bills of Exceptions, and no Bills of Exceptions were proposed or offered either to plaintiff or to the court for the purpose of being signed by the court until the 3rd day of December, 1931, and after the time had expired within which the court had jurisdiction to sign Bills of Exceptions, and therefore the court is without jurisdiction to sign any Bills of Exceptions in this action.

And plaintiff, by counsel, further objects to the transcript as made by K. T. Manning, Reporter, being filed as a part of the records in this cause because said transcript can only be made a part of the record by a Bill of Exceptions duly signed by the court and the time for the signing of the Bill of Exceptions has expired and had expired before said transcript was tendered for filing.

(Signed) George T. Bell, (Signed) S. T. Spears,
Attys. for Plaintiff.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN F. BROWN—Filed December 14, 1931

STATE OF WEST VIRGINIA,
County of Randolph, ss:

Affiant, being first duly sworn, says that he is an attorney at law practicing in the above Court, and was of counsel for defendants therein upon the trial of the above styled case, and was present at the conclusion of said trial on the day [fol. 65] that the verdict was rendered for the plaintiff and personally submitted on behalf of defendants the motion to set aside the verdict of the jury as contrary to the law and the evidence and as excessive, and after the trial judge had forthwith overruled said motion, he, affiant, immediately and publicly in Court, acting as counsel for defendants and on their behalf, directed Kemble T. Manning, who had been sworn as Court reporter in the case and who was present in Court, to proceed to transcribe the evidence taken on the trial and the proceedings had thereat, and thereupon an-

nounced publicly in Court that the defendants intended to appeal. And affiant further says that on more than one occasion, prior to November 16, 1931, he urged Reporter Manning to rush and complete said transcript.

John F. Brown, Affiant.

Taken, subscribed and sworn to before me this 11th day of December, 1931, as witness my hand and notarial seal. My commission expires Dec. 3rd, 1938. Hallie H. Hoefar, Notary Public. (L. S.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. A. BOWERS—Filed December 14, 1931

STATE OF WEST VIRGINIA,
County of Randolph, ss:

E. A. Bowers, being first duly sworn, says that he is one of counsel of record for defendants in above styled suit but was absent from the Court Room when the trial opened on July 22, 1931, but returned to the Court Room and the trial on the morning of July 24, 1931, and was there present continuously during the trial until after the argument of counsel, but was called away from the City of Elkins, at which place said trial occurred, and was absent at the time the Court delivered his charge and when the jury returned its verdict on August 7, 1931, and was discharged.

[fol. 66] Affiant further says that on returning to Elkins he learned no judgment had been entered on the verdict but that his associate, John F. Brown, of the City of Elkins, had directed the reporter, Kemble T. Manning, to transcribe the evidence and proceedings on the trial; that affiant, on August 10th, 1931, communicated with said Manning, repeating the direction to prepare the transcript of the proceedings on the trial urging him to speed the work, to which he replied that he had other transcripts of trials which occurred ahead of above mentioned trial but that he would forego his work of reporting in another court, then soon to begin, and would pursue the transcribing of this record as diligently as possible; that cost and charges for making said transcript were then discussed and the reporter was

made definitely to understand that the transcript was to be made and the work must be speedily begun, and the proper customary fees would be paid to him; that on August 18, 1931, affiant, after talking with Reporter Manning on the telephone respecting his work and being advised that he had not yet started it, wrote a letter to Reporter Manning (whose residence and office is at Elkins, West Virginia) in the following langauge:

"Western Maryland Railway Company

Elkins, West Virginia, August 18, 1931.

Mr. K. T. Manning, Court Reporter, Elkins, W. Va.

DEAR SIR:

Re Brady vs. B. & O. and W. M.

Confirming order which I think was heretofore given you, please be advised that the defendant Railroad Companies want only one carbon copy of the transcript. In making up this transcript we do not care to have you lengthen it by inserting arguments of counsel on exceptions and objections during the introduction of evidence. I understand Judge Baker doesn't expect you to insert these arguments.

[fol. 67] If you will tell us what forms of documents you want us to supply to you and the number thereof, I will send for them at once.

It is of the utmost importance that this transcript be prepared without any avoidable delay. If you will turn over to me from time to time, say each week, the carbon of the part that you have completed I will appreciate it and it will save us a lot of time and worry in preparing our assignments of error.

Yours truly, (Signed) E. A. Bowers, Gen'l Attorney for West Va.

EAB:HH."

Affiant further says that on August 11, 1931, Mr. S. T. Spears, of Elkins, one of counsel for plaintiff, submitted to affiant a form of judgment order which he proposed to ask should be entered on the verdict of the jury in this

case, wherein said Spears stated that he knew the defendants expected to appeal the case and further stated that he desired to present the judgment order to the Court within two or three days thereafter. Affiant reproduces the last aforesaid letter as follows:

"Law Offices of Sam T. Spears, Elkins, W. Va.

August 11, 1931.

E. A. Bowers, Esq., Elkins, West Virginia.

Dear Mr. Bowers: I enclose herewith copy of an order which I contemplate asking the judge to enter in the case of Brady vs. Railroad Companies. You will observe that I am leaving for the future consideration of the court the matter of attorneys' fee. Inasmuch as you expect to appeal this case I think the matter of attorneys' fee should wait until final decision in the higher court and the reservation in that respect was made for that purpose. Kindly [fol. 68] give the matter your attention and if the order does not meet with your approval let me know. I am sending a copy to Mr. Bell and as soon as I hear from him I will want to present the matter to the court, which will probably be in the next two or three days.

Yours very truly, (Signed) S. T. Spears.

STS/DC."

On August 17th Affiant appeared with said Spears before Honorable W. E. Baker, United States District Judge, Northern District of West Virginia at Elkins, who presided at said trial, in chambers, at which time said Spears presented aforesaid judgment order and affiant suggested some additions thereto by way of exceptions to the action of the Court in entering judgment for plaintiff, at which time there was discussed with said Judge the matter of allowance of attorneys' fee to be taxed as part of plaintiff's costs, as provided by the Federal statute in cases of this character, and the postponement of such allowance until after an appeal instead of the fixing of the same by the judgment order and in connection therewith it was definitely stated and understood that defendants intended to appeal, had ordered the transcript of the record from

the reporter, and in connection therewith affiant says he earnestly sought the indulgence and approval of counsel for plaintiff to an arrangement by which the entry of the judgment order should be delayed until such time as it would be apparent to affiant and the parties that the transcript could and would be completed by the reporter before expiration of the three month period for appeals and then and there said Spears indicated to the Court and to affiant that he anticipated there would be delay and more or less difficulty in obtaining the transcript from the reporter and that while he insisted upon a judgment in a reasonable time he would not object to a short delay in the entry of the judgment order; and thereupon affiant asserted that he was afraid of embarrassment resulting from delay of the reporter and wanted to avoid such embarrassment, being very fearful that it would occur, and said Spears stated to affiant that plaintiff's counsel had no intention to embarrass counsel for defendants and did [fol. 69] not want to see counsel for the defendants embarrassed in the matter of their appeal as a result of the failure of the reporter to prepare his transcript. At said conference, upon affiant emphasizing the probability of delay by the reporter and pointing out the importance and necessity of having the transcript before assignments of error and bills of exception could be prepared, affiant requested Judge Baker to phone to reporter Manning from his office and Judge Baker did immediately call said reporter Manning by telephone and stated to said Manning the necessity and importance that he should complete his transcript in this case and made it entirely plain to said Manning that he, as the Judge, expected him, Manning, as reporter, not to fail to get his transcript completed with diligence.

Affiant further says that aforesaid interview with Judge Baker terminated with the statement and understanding that entry of judgment order would be withheld until a few days before said Judge should be obliged to leave Elkins to begin his regular term at Martinsburg, West Virginia, early in September.

On Monday, September 7, 1931, affiant was informed by the Clerk of said Court that judgment order had been entered. Thereupon, affiant immediately communicated with

reporter Manning, again emphasizing to him the importance of completing the transcript, notifying him thereby that the period of limitation on appeals had begun to run and said reporter informed affiant he had made considerable progress on the transcript, which is similar information to that which had been given to affiant by said reporter over the period intervening between August 17th and September 7th, 1931.

Affiant further says that on September 10, 1931, he had an interview with said Spears, one of counsel for plaintiff, in respect to stay of execution on aforesaid judgment, at which interview it was definitely agreed by said Spears that no execution would be issued on said judgment during the statutory period for appeals and no stay-bond need be given, on the understanding of course that we intended to appeal. Affiant at said interview again repeated his fears that the reporter would not complete his transcript within the limited time and stated the necessity to have the transcript of evidence before intelligible assignments of error and before proper bills of exception could be prepared. [fol. 70] And said Spears expressed himself plainly to the effect he realized the situation and that we were at the mercy of the reporter and that he would do all he reasonably could to aid us in avoiding embarrassment. Affiant expressed his appreciation of this courtesy on the part of opposing counsel and in a large measure relied thereon because, having known and been intimately in professional contact with said Spears for upwards of thirty years, affiant had always known him to be strictly honorable in living up to the letter and spirit of his commitments. Affiant further says that on several later occasions he mentioned to said Spears that reporter Manning had not yet completed his transcript and affiant feared he had not really begun the preparation thereof and in the course of time intervening between September 10th and about mid-October, 1931, affiant learned from said Spears that he, Spears, had remonstrated with said reporter Manning on account of his delay in transcribing the record in this suit.

Affiant further says that the first portion of said reporter's transcript (consisting of carbon copy of 155 pages, the total of which consists of about 1,000 typewritten

pages) was delivered to him on October 27th and the preparation of the narrative of evidence and bills of exception based thereon was begun and diligently continued and progressed as succeeding pages were delivered, until the narrative and bills were completed on December 1st, 1931, which was the day on which the last pages of copy of said evidence were delivered to counsel for defendants. Affiant, prior to said date, had repeatedly urged said reporter to do his work and begin delivery of transcript and had expressed to him much dissatisfaction and impatience at his persistent delay; and after the delivery of aforesaid carbon copy of 155 pages and almost every day affiant continued urging said reporter to perform his duty and deliver carbon pages of transcript as completed. Becoming much exasperated by the dilatoriness of the reporter, on November 4, 1931 (no pages in addition to said carbon 155 having been yet delivered by the reporter) affiant called said Judge Baker by telephone at Wheeling, West Virginia (at which place said Judge was then sitting at his Court), earnestly requesting said Judge to do something to make the reporter complete his work and said Judge informed affiant that he would immediately write to said Manning and send [fol. 71] me copy of the letter; and affiant says that on or about November 6, 1931, he received a letter from said Judge enclosing carbon copy of his letter to said Manning, which copy of letter is reproduced as follows:

"Wheeling, November Fifth, 1931.

K. T. Manning, Esq., Elkins, West Virginia.

In re Brady vs. Railway Company

DEAR MANNING: Complaint has been made to me by counsel that you have not yet transcribed the record in the above styled cause.

More than two-thirds of the time has elapsed in which the defendants may prepare their record for appeal. It is useless to have evidence taken down if counsel are unable to get a transcript of the record.

I have just publicly announced that a reporting firm from Pittsburgh will not be allowed to report future cases in this court on account of their delay in getting up transcript. I

must insist upon your completing this record in the next few days.

Very truly yours, (Signed) W. E. Baker."

Affiant further says that up to November 9, 1931, despite repeated urgings by affiant and said Judge, said reporter had completed only 261 pages of said transcript and delivered carbon of same to affiant and on said day affiant received assurance from said reporter that the transcript would be completed and delivered to affiant first of following week. Affiant repeatedly many times emphasized to said reporter the high importance to defendants of having the transcript so that they might prepare their assignments of error and bills of exception. Practically from day to day thereafter said reporter did deliver to affiant carbon copy of pages of said transcript, sometimes forty to fifty, sometimes as many as one hundred pages and sometimes as few [fol. 72] as fifteen to thirty pages, until finally, on November 30, 1931, said reporter delivered to affiant's office carbon copy of all of the pages of transcript of evidence taken on said trial and thereafter completed transcribing his notes of the proceedings in respect to the Court's Charge and not until December 3, 1931, after four o'clock P. M., did said reporter certify and deliver his transcript to the Clerk of said Court and deliver to affiant copy thereof, complete.

Affiant further says that as rapidly as copies of pages of said transcript came into the hands of counsel for defendants, they pursued their work of narrating the evidence, preparing their assignments of error and their bills of exceptions but it was wholly impossible to complete said assignments of error and bills of exception and the same were not completed, on account of the delay in delivery of said transcript, until late on December 2nd, 1931, and on December 3rd, 1931, the same were submitted to the Court in connection with the submission of petition for appeal and the entry of an order allowing said appeal and fixing the amount of required bond.

Affiant further says that the trial of this case progressed continuously, each Court day, from July 22nd, 1931, to August 4, 1931, inclusive, introducing evidence of witnesses; that it was proper and necessary for convenience of the parties and the Court, in a case of this size and importance as is the custom in said Court, to have the evidence of wit-

nesses taken down in shorthand and later, after trial ended, transcribed into typewriting, as was done; and it was necessary in this case that defendants should have the evidence transcribed by the reporter to enable their counsel to prepare assignments of error and bills of exception as there were many exceptions to introduction and refusal to permit introduction of oral and documentary evidence.

E. A. Bowers, Affiant.

Taken, subscribed and sworn to before me this 11th day of December, 1931, as witness my hand and notarial seal. My commission expires Dec. 3rd, 1938. Hallie H. Hoefar, Notary Public. (Notarial Seal.)

[fol. 73] In United States District Court

Affidavit of S. T. Spears—Filed December 14, 1931

State of West Virginia,
County of Randolph, ss:

S. T. Spears, being first duly sworn, says that he is one of counsel for plaintiff in the above styled cause and is the S. T. Spears referred to in the affidavit of E. A. Bowers tendered in this case on the 14th day of December, 1931. Affiant says that he has no recollection of Mr. Bowers on any occasion referring especially to the matter of having signed Bills of Exceptions in this case. It is true that Mr. Bowers was concerned about being able to get the transcript of the evidence in time to prepare the Assignments of Error necessary before filing their petition for an appeal.

That with respect to the averments of the affidavit of the said Bowers to the effect that affiant remonstrated with reporter Manning on account of his delay in transcribing the record, affiant says that owing to the remarks of Mr. Bowers made at the time of the conference with the Honorable W. E. Baker when the judgment order was presented, affiant did then or a very few days thereafter see Mr. Manning and advised Mr. Manning that Mr. Bowers seemed to be exercised and in fact out of humor with the reporter and feared that he would not get the transcript in time for de-

fendants to prepare their Assignments of Error and petition for appeal and affiant did specifically state to Mr. Manning that as counsel for plaintiff affiant wanted him to go on and get up this transcript without delay. So far as affiant can now recall he never mentioned the matter to Mr. Manning again until after the question of the right of defendants to have Bills of Exceptions signed, arose.

Affiant further says that the only time that he discussed with Mr. Manning the matter of said transcript in connection with the Bills of Exceptions, was after the said term of court had adjourned and that Mr. Manning on that occasion informed affiant that he had understood all along from counsel for defendants that he had until December 4th, 1931, within which to deliver this transcript and that he did deliver the same before that date. That while he [fol. 74] was transcribing said evidence he arranged with the stenographer in Mr. Bowers' office to correct the same, for which services he gave an order on defendants to pay therefor, and that the copy of the evidence in the case was delivered to Mr. Bowers from day to day as the same was being transcribed.

S. T. Spears, Affiant.

Taken, sworn to and subscribed before me this 14th day of December, 1931. My commission expires on the 14th day of December, 19—. Claude W. Maxwell, Notary Public. (L. S.)

In United States District Court

Opinion—Filed February 11, 1932

This case was tried at the June term 1931 of this Court held in Elkins and a verdict rendered on August 7.

A motion was made to set aside the verdict, which the Court promptly overruled. For the purpose of allowing the court reporter ample time in which to get up the transcript of the record, and at the request of counsel for defendants, the judgment order was not entered at that time. On September 5, 1931, counsel for plaintiff and defendants appeared in Court, plaintiff's counsel asking that the judgment order be entered. Counsel for defendants stating

they could not ask further delay, the judgment order was entered on the 5th day of September, 1931, this still being within the June term.

Under standing rule No. 22 of the Court, the June term expired on November 16, 1931, which rule reads as follows:

"The adjournment of court at any time during any stated term shall not be deemed a final adjournment of the term; but such term shall continue for the general transaction of [fol. 75] business until the commencement of the next stated term at that place of holding court; and the court shall, to that end, pending the absence of the judge, stand and be deemed adjourned from day to day without formal order.

Upon any day during the continuance of such term on which the clerk shall receive any order, judgment or decree transmitted by the judge for entry, he shall open the court for the transaction of business and enter such order, judgment or decree upon the proper order book."

Rule 23 of Rules of Prac. District Court Northern Dist. of W. Va.

There is no standing rule of this Court in any way attempting to extend a term for the purpose of signing bills of exceptions. No order was entered during the June term and no order was requested during that term for an extension of time beyond the term within which to sign bills of exceptions.

On November 16, 1931, the June term of the Court expired; on December 3, the defendants presented, for the first time, proposed bill of exceptions and gave notice to counsel for plaintiff that on December 14 a motion would be made to the Court to have the bill of exceptions signed. Upon presentation of said bill of exceptions plaintiff objected to said motion on the ground that the time had expired in which bill of exceptions could be signed and that the Court had lost jurisdiction of the case for that purpose. At the same time (December 3) a transcript of the evidence and proceedings at the trial was tendered and plaintiff by counsel also objected to the filing of said transcript because the time had expired within which bill of exceptions could be signed by the judge and the transcript could not be made a part of the record except by lawful bill of exceptions.

The Questions Presented

The questions now presented is whether or not the Court has lost jurisdiction in this case for the allowing of bill of exceptions.

[fol. 76] Time for Presentation and Allowance of Bill of Exceptions

"A bill of exceptions cannot be considered by an appellate court unless it was duly presented to and allowed by the trial judge during the term at which the trial was had or within the time as extended by an order made during such term; or, where there is a rule of court on the subject, during the time so fixed or an extension granted before its expiration."

Oxford & Coast Line R. Co. vs. Union Bank, 153 Fed. 723 (4 C. C. A.).

Yellow Poplar Lumber Co. vs. Chapman, 74 Fed. 448 (4th C. C. A.).

The bill of exceptions must therefore be prepared and settled during the term at which the judgment is entered or during the time provided for in any order made by the judge during the term, extending the time beyond the term. A district judge is without authority to sign a bill of exceptions after the term and after cause has been removed to the appellate court unless the time has been previously extended.

Yellow Poplar Lumber Co. vs. Chapman, 74 Fed. 444, and cases cited. (4 C. C. A.)

Greyerbiehl vs. Hughes Elec. Co., 294 Fed. 802 and cases cited. (8 C. C. A.)

U. S. vs. Meadows, 29 Fed. (2) 739 (8 C. C. A.).

U. S. Todar, 41 Fed. (2) 146 (7 C. C. A.).

U. S. vs. Seale, 45 Fed. (2) 394 (5 C. C. A.).

Hughes Fed. Proc., Vol. 6, page 420, Sec. 3888.

Enc. Fed. Proc., Vol. 6, page 103, Sec. 2724.

Dobey on Fed. Proc., Sec. 159, page- 617 to 619.

Claude M. Dean Address before W. Va. Bar Assn. Sept. 10, 1929, page 7 et seq.

Whatever doubt there may have been as to the time within which bill of exceptions may be settled and signed

is clearly set forth by the Supreme Court in the case of Exporters vs. Butterworth-Judson Co., 258 U. S. 365, 368, wherein the Supreme Court holds:

[fol. 77] "In the recent case of O'Connell vs. United States, 253 U. S. 142, 146, we affirmed the doctrine announced in Mich. Ins. Bank vs. Eldred, 143 U. S. 293, 298, 'By the uniform course of decision no exceptions to the rulings at the trial can be considered by this court unless they were taken at the trial and were embodied in a formal bill of exceptions presented to the judge at the same term or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented or to alter or amend a bill of exceptions already allowed and filed, is at an end.' And applying this rule we held the bill of exceptions filed by the trial judge after the expiration of the time allowed by the rule of the court, was not part of the record.

"In the present case the term as extended had expired before any action concerning the bill of exceptions was taken by either court or counsel. In such circumstances the court had no power to approve it unless this could be conferred by mere consent of counsel. This they could not do. Consent of the parties cannot give jurisdiction to courts of the United States. Pittsburg C. & St. L. R. Co. vs. Ramsey, 22 Wall. 322, 327. The policy of the law requires that litigation be terminated within a reasonable time and not protracted at the mere option of the parties. See U. S. vs. Mayer, 235 U. S. 55, 70. We think the better rule, and the one supported by former opinions of this court, requires that bills of exceptions shall be signed before the trial court loses jurisdiction of the case by expiration of the term, or such time thereafter as may have been duly prescribed."

It is contended by defendants that the Court has power to sign this bill of exceptions on two grounds:

(1) That the facts of this case present "extraordinary circumstances" which take it out of the rule requiring the bill of exceptions to be signed within the judgment term or [fol. 78] within a time extended by an order of the Court entered during the judgment term.

(2) That under standing Rule 14 of this Court, this is a matter pending at the close of the term not disposed of, and thereby stood continued until the next term.

I have carefully considered the brief of defendants on the question of extraordinary circumstances. There were no extraordinary circumstances in this case. Had the presiding judge been out of the district or, for any reason counsel for defendants could not reach him, then this question would have been present. The judge of the Court returned to his home in Elkins on Saturday, November 14; was well, and in his office on Saturday evening the 14th, Sunday the 15th, and Monday the 16th—all before the term expired where he could have been seen at any time had counsel so desired and obtained an order extending the time for the preparation of the bill of exceptions. In case the Court was ill, or absent at the very end of the time limit so that presentation could not have been made to him personally of the bill of exceptions or an order extending the time, this doubtless would be considered extraordinary circumstances. As indicated in the Butterworth case, as it is construed by the Circuit Courts, exceptions are extremely limited and in no event can possibly intervene if they result from the acts of the parties or their counsel. It seems the Supreme Court of the United States practically eliminates the doctrine of extraordinary circumstances; at least it so limited the application of that principle that it could have no application under the circumstances disclosed in this case. Since the decision of the Butterworth case, Federal Courts have uniformly held that failure to secure timely bills of exceptions is fatal if the failure is, in any way, the fault of the parties or their counsel.

As was said by the Court in the case of Farm Mortgage & Loan Co. vs. Willett in the decision of the District Court, Western Division of New York, reported 285 Fed. 42, in which the Court quotes from the case of Gleckstein vs. U. S., 215 Fed. 90 (C. C. A.), as follows:

[fol. 79] "The extraordinary circumstances mentioned in the Supreme Court cases which justify the signing of bills of exceptions after the term has expired, relate to circumstances which caused the delay and cannot be said to include negligence of the party or the importance or difficulty of the questions involved."

Inability of court reporter to deliver the transcript of record until expiration of term was insufficient to excuse delay of defendants in asking for an extension of time, within the term, to prepare their bill of exceptions. Sprague vs. Chicago B. & Q. R. Co., 17 Fed. (2) 768. Hence, I conclude no extraordinary circumstances in this case intervened.

Does Rule 14 Apply?

The only part of Rule 14 of this Court that could possibly have any bearing on this case is the last paragraph thereof, as follows:

"All cases and matters pending at the close of a term and not otherwise disposed of, shall stand continued as of course to the next term without formal order."

It is conceded that this could not be a cause pending but it is argued that it is a matter pending. In support of this position defendants say they gave notice of their intention to appeal this case. The only possible basis for this contention is that when the trial court overruled the motion to set aside the verdict and grant a new trial, counsel for defendants stated they intended to appeal the case and the reporter was requested to make up the transcript; that from time to time statements were made by defendants that they intended to appeal the case.

It is obvious that Rule 14 can have no application to the signing of bills of exceptions. If by any stretch of the imagination bills of exceptions could be included under this rule, there never would be a time when the right to have bills of exceptions signed and filed would expire.

The question as to whether or not mere statement by counsel for a party of an intention to appeal a case, being a matter pending, is settled by our Circuit Court of Appeals (4th) in the case of Osborne vs. U. S., 50 Fed. (2) 812. [fol. 80] That was a case where the appeal was not taken

until after the expiration of the three-months period, but, as an excuse therefor, it was contended that the appellant gave notice of an appeal before the three-months period had expired, and the Court says:

"Aside from this a notice of appeal is not sufficient. The act of Congress (U. S. Code Title 28 Sec. 230) requires that an application must be made for the appeal. While the courts may be liberal in construing that word, yet they are not at liberty to disregard its reasonable meaning which in this usage necessarily carries the element of request. * * *

"The result is that under the act as amended appeals cannot be taken by notice, but there must be an application therefor in accordance with the rules covering appeals."

Counsel for defendants in their briefs say that the "effort" was pending. The claim that making the announcement that defendants intended to take an appeal makes it a matter pending, is completely refuted in the Osborne case (supra). There was no request of any kind or character made to this Court prior to the time it lost jurisdiction for extension of time for the purpose of signing bill of exceptions. There was nothing pending before this Court on that question. Defendants were at liberty at any time to abandon their announced intention to appeal. They were not required to get the consent of the Court to do that. There was nothing for the Court to pass on with respect to that matter. The granting of an appeal goes as a matter of course and a matter of right.

Counsel for defendants define the word "pending" as a "matter undecided." There can be nothing decided or undecided by a Court until something is before the Court for its decision. The question of signing this bill of exceptions was not before the Court until December 3, 1931, and it had already lost jurisdiction of the matter on November 16, 1931.

The facts in this case present no "extraordinary circumstances" which take it out of the rule requiring that bills of exceptions be signed within the judgment term or within a [fol. 81] time extended by an order of the Court entered during the judgment term.

Under standing Rule 14 of this Court there was no matter pending before the Court at the close of the term and

undisposed of. The simple, plain fact is that defendants and their counsel's oversight, and not the reporter's dereliction, was the proximate cause of this whole trouble. When confronted with matters involving the default of parties or their counsel, the courts of the United States, from the Supreme Court down, hold that this is no excuse. In the case of Witte vs. Franklin Fire Ins. Co. of Phila., 46 Fed. (2) 894, the 8th C. C. A. under date of February 14, 1931, says:

"It is regrettable that, on account of neglect of counsel, cases cannot be heard on their merits."

As stated in the case of U. S. vs. Stephanidis et al., 46 Fed. (2) 691, notwithstanding it involves a judgment of over one hundred thirty-six thousand dollars:

"If plaintiff had been careful to observe the rules in regard to obtaining an extension of the term, there would have been no difficulty even in this regard."

The law is plainly against the contention of the defendants on the facts here presented. The Court has no right or authority to sign and certify the bill of exceptions asked; hence, it declines to do so.

W. E. Baker, Judge.

Feb. 11, 1932.

In United States District Court

Order—Court's Refusal to Allow Bill of Exceptions—Filed and entered Feb. 19, 1932

This 19th day of February, 1932, at Elkins in said District, came the parties hereto by their attorneys, and the Court having maturely considered the defendants' bill of exceptions lodged in the Clerk's office of this Court on December 3, 1931, and the written objection of the plaintiff to the signing of said bill of exceptions filed on December 14, 1931, and, for reasons appearing in a written opinion [fol. 82] (filed herein on February 11, 1932, and now ordered to be and made a part of the record in this case), being of opinion that the Court was without jurisdiction to sign said bill of exceptions at the time the same was lodged,

and now is without such jurisdiction, the Court doth therefore sustain said objection of the plaintiff and doth refuse to sign, or make a part of the record herein, said bill of exceptions; to which action of the Court in sustain-g said objection and refusing to sign said bill of exceptions, the defendants except.

Enter.

W. E. Baker, Judge.

IN UNITED STATES DISTRICT COURT

MEMORANDUM UNDER SEC. 7 OF RULE 14 OF C. C. A.

(1) Petition for appeal filed the 3rd day of December, 1931.

(2) Order allowing appeal filed and entered the 3rd day of December, 1931.

(3) Appeal Bond: Approved and filed on the 4th day of December, 1931.
Penalty $75,000.00.
Obligors: Baltimore and Ohio Railroad Company, Western Maryland Railway Company, United States Fidelity & Guaranty Company.
Conditioned for judgment, damages and costs.

(4) Citation. Dated December 4, 1931.
Served December 4, 1931.
Filed December 7, 1931.

(5) Order extending time for filing transcript entered on January 6, 1932.

[fol. 83] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed Feb. 27, 1932

To A. C. Merrill, Esquire, clerk of said court:

The undersigned defendants in above styled suit direct that you please prepare and certify a transcript of the record thereof, as now constituted, for appeal to the United

States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, including therein the following:

1. Plaintiff's petition filed February 6, 1930, accompanied by Exhibits A and B (attached to the petition as printed documents), accompanied also by order of the Interstate Commerce Commission dated February 28, 1929.

2. Return of service of above petition on the two defendants The Baltimore & Ohio Railroad Company and Western Maryland Railway Company.

3. Appearance by counsel for defendants, March 10, 1930.

4. Demurrer filed on behalf of The Baltimore & Ohio Railroad Company.

5. Demurrer filed on behalf of Western Maryland Railway Company.

6. Demurrer assigning grounds, filed on behalf of The Baltimore & Ohio Railroad Company.

7. Demurrer assigning grounds, filed on behalf of Western Maryland Railway Company.

8. General issue plea filed on behalf of defendant The Baltimore & Ohio Railroad Company.

9. General Issue plea filed on behalf of defendant Western — Railway Company.

[fol. 84] 10. Order overruling demurrers entered July 14, 1931.

11. Order bringing on suit for trial swearing reporter, jury, etc., entered July 22, 1931.

12. (Insert any Court minutes entered from day to day during the progress of the trial if they show anything other than the fact that the case continued on trial.)

13. Order entering verdict, etc., entered August 7, 1931.

14. Order entering judgment, September 5, 1931.

15. Defendants' notice and service thereof, that their bills of exception, etc., will be presented on December 3, 1931, filed December 2, 1931.

16. Defendants' assignments of error filed with petition for appeal, December 3, 1931.

17. Order entered December 14, 1931, taking time to consider matter of bills of exception.

18. Written objection filed by counsel for plaintiff, filed December 14, 1931.

19. Affidavit of John F. Brown, filed December 14, 1931.

20. Affidavit of E. A. Bowers, filed December 14, 1931.
21. Affidavit of S. T. Spears, filed December 14, 1931.
22. Order entered January 6, 1932, extending time for filing transcript in Court of Appeals.
23. Court order of February 19, 1932.
24. Court's opinion, filed February 11, 1932.
[fol. 85] 25. Memorandum required by Article 7, Rule 14 of the Circuit Court of Appeals, Fourth Circuit.
26. This præcipe with stipulations of counsel for parties thereto appended.

Dated this February 27th, 1932.

Eugene S. Williams, Charles R. Webber, E. A. Bowers, John F. Brown, Attorneys for Defendants, The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation.

In United States District Court

Stipulation as to Make-up of Record and Printing Same

On this February 27, 1930, the undersigned parties to the above entitled suit, on appeal to the United States Circuit Court of Appeals of the Fourth Circuit, by their attorneys of record, stipulate pursuant to Section 3, Rule 14 of said United States Circuit Court of Appeals for the Fourth Circuit, that the record of said suit on appeal, as the same now appears in the records of the United States District Court for the Northern District of West Virginia at Elkins, in conformity with said Section 3 of said Rule 14, be made up as directed by the foregoing præcipe.

It is further stipulated that said record when so made up, certified and transmitted to the Clerk of said United States Circuit Court of Appeals for the Fourth Circuit, shall be printed in accordance with Rule 23 of said Court.

But said defendants and appellants The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, without limiting the effectiveness of the foregoing stipulation, save to themselves the right, if found to exist, hereafter to cause to be inserted in and made part of said record, in accordance with the rules and practice

of said United States Circuit Court of Appeals, bills of ex-
[fol. 86] ception, if any, which may be settled, sealed and save- to them.

Dated this February 27, 1932.

The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation, Defendants, by Eugene S. Williams, Charles R. Webber, E. A. Bowers, John F. Brown, Their Attorneys of Record. A. Spates Brady, Plaintiff, by George T. Bell, His Attorney of Record.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 87] In United States Circuit Court of Appeals for the Fourth Circuit

No. 3283

The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation, Appellants,

versus

A. Spates Brady, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Elkins

Docket Entries

March 11, 1932, the transcript of record is filed and the cause docketed

Same day, the original petition for appeal, order allowing appeal, appeal bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, order extending the time to and including the 1st day of April, 1932, within which to file the transcript of record in this Court, together with certificate of Clerk of District Court and certified copy of said order, are filed.

Same day, the appearance of E. A. Bowers is entered for the appellants.

March 14, 1932, the appearance of George T. Bell is entered for the appellee.

March 16, 1932, the appearance of Samuel T. Spears is entered for the appellee.

[fol. 88] March 17, 1932, the appearance of George M. Hoffheimer is entered for the appellants.

March 19, 1932, the appearance of Eugene S. Williams and William C. Purnell is entered for the appellants.

March 31, 1932, the appearance of Charles R. Webber is entered for the appellants.

Same day, twenty-five copies of the printed record are filed.

June 9, 1932, notice of and motion of appellants for a continuance is filed. Service accepted by counsel for the appellee.

June 9, 1932 (June term, 1932), cause argued on motion of appellants for a continuance before Parker, Northcott, and Soper, Circuit Judges, and submitted.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING MOTION TO CONTINUE AND AS TO APPELLANTS' REPLY BRIEF—Filed and entered June 9, 1932

Upon consideration of the motion of appellants for a continuance of the above entitled cause, and the argument of counsel thereupon had as well in support of as against the same,

It is now here ordered by this court that said motion be, and the same is hereby, denied.

It is further ordered that the time within which the appellants may file a reply brief be, and the same is hereby, extended to and including June 14, 1932.

June 9, 1932.

John J. Parker, Senior Circuit Judge

[fol. 89] In United States Circuit Court of Appeals

Argument of Cause

June 15, 1932 (June term, 1932), cause came on to be heard before Parker, Northcott, and Soper, Circuit Judges, and is argued by counsel and submitted.

United States Circuit Court of Appeals, Fourth Circuit

No. 3283

The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation, Appellants,

versus

A. Spates Brady, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Elkins

(Argued June 15, 1932. Decided October 3, 1932)

Before Parker, Northcott, and Soper, Circuit Judges

William C. Purnell and George M. Hoffheimer (Charles R. Webber, E. A. Bowers and Eugene S. Williams on brief) for appellants, and George T. Bell and Samuel T. Spears for appellee.

Opinion—Filed October 3, 1932

[fol. 90] Parker, Circuit Judge:

This is an appeal in an action instituted pursuant to Section 16(2) of the Interstate Commerce Act as amended (49 U. S. C. A. 16(2)) to recover damages sustained by the plaintiff, A. Spates Brady, as a result of the failure and refusal of the defendants, the Baltimore and Ohio Railroad Company and the Western Maryland Railway Company, to furnish to plaintiff coal cars in which to ship the product of his coal mine. Prior to the institu-

tion of the action plaintiff applied for relief to the Interstate Commerce Commission under Section 9 of the act; and the Commisison found the acts and practices complained of to be discriminatory and unduly prejudicial and retained the cause for the purpose of assessing his damages. Upon a later hearing it found that complainant had sustained damage as a result of the wrongful conduct of defendants in the sum of $57,735.11, but that he might have reduced this damage to $12,838.31 by accepting an offer of defendants relating to the furnishing of cars and entered a reparation order for the latter amount. The defendants refused to pay even this amount and plaintiff filed his petition in the District Court under Section 16(2) of the act, asking that he have judgment for the full damages which he had sustained, including not only the amount of the reparation order, but also the amount by which his damages had been diminished under the holding of the Commission as to his duty to reduce damages, contending that this holding was unwarranted by the facts and was beyond the power of the Commission.

There was a verdict and judgment for the plaintiff for the sum of $63,048.60 with interest from August 7, 1931, the date of the verdict; and defendants have appealed. The record contains no bill of exceptions. See Baltimore & Ohio Railway Co. et al. v. Baker (C. C. A. 4th), 58 Fed. (2d) 627. Consequently the only assignments of error which we may consider are those which relate to the record proper. The question which these raise is whether the judgment in favor of the plaintiff is supported by the petition. U. S. v. Archibald McNeil & Sons, 267 U. S. 302; Thornton v. National City Bank, (C. C. A. 2d) 45 Fed. (2d) 127, 129.

[fol. 91] The petition alleges that between October 14, 1922, and April 1, 1923, plaintiff owned and operated a coal mine on the Coalton branch of the Baltimore and Ohio Railroad in proximity to coal mines of the West Virginia Coal & Coke Company, a competitor of plaintiff, on the same branch; that some time prior to October 14, 1922, the Western Maryland Railway Company was granted trackage rights over this branch to the Coal & Coke Company's mines under an agreement which was in effect until April 1, 1923; that these trackage rights were exer-

cised throughout the period between said dates by the Western Maryland, which published and had in effect during the period schedules naming rates for the transportation of coal from the mines of the Coal & Coke Company to interstate points on its lines and the lines of numerous connecting railroads; that the effect of the trackage rights granted the Western Maryland was to give to the mine of plaintiff the status of a mine served by two lines of railroad; that during the period in question a car shortage existed and the effect of the trackage agreement was to give plaintiff the right to order his allotment of cars and ship his coal via either or both of the lines as his judgment might dictate; that this right was denied by the defendants, although they daily honored the orders for cars of his competitor; that throughout the period plaintiff filed written orders for cars with the Western Maryland, which, except in one instance, refused to place cars for loading at his mine, whereupon he filed orders with the Baltimore & Ohio; that the discriminatory acts and practices of the defendants in refusing to furnish cars to plaintiff in accordance with his right were unjust and unduly prejudicial and resulted in great loss and damage to him; that the Western Maryland had a better supply of cars available for distribution and, if that road had honored his daily requisitions for cars, he would have been entitled to receive during the period 818.1 cars, which he could have loaded with an average of 53.55 tons of coal; that he actually received only 372.8 cars (the Commission in its report attached to the petition found that only 5 of these were furnished by the Western Maryland and the remainder by the B. & O.); that the state of the market was such that he could have sold the entire output of his mine at the same aver- [fol. 92] age price as the coal actually produced; that if he had been furnished the cars to when he was entitled he could and would have loaded them with coal and sold same at a profit; and that, as a result of the unlawful acts and practices of defendants, he lost profits on the coal that he would otherwise have sold, and suffered an increase in cost of producing the coal actually mined and sold, amounting in all to $57,735.11, for which amount, with interest from April 1, 1923, he was entitled to judgment against defendants.

The petition further alleges that in October, 1923, the plaintiff filed with the Commission a complaint against the defendants alleging that the refusal to furnish him with cars as alleged was in violation of the Interstate Commerce Act as amended and praying an award of reparation for the damages sustained; that the Commission found that plaintiff should have been permitted to divide his orders for cars to the defendants in such divisions of 100 per cent of the rating of his mine as his judgment dictated, that cars should have been furnished in conformity with the supply of cars available on the respective roads, and that the acts and practices of defendants resulted in undue prejudice to plaintiff; that the Commission then set the case down for further hearing on the question of damages and upon such hearing found the excess mining costs and lost profits of plaintiff amounted to $57,735.11, as claimed, but held that in computing damages this amount should be reduced by the amount by which the loss would have been mitigated if plaintiff had accepted an offer of defendants to furnish his quota of cars on the basis of 80 per cent by the Western Maryland and 20 per cent by the B. & O. and also by the amount attributable to the estimated excess loading of the cars, as same had a rated capacity of only 50 tons per car; that the Commission made revised calculations based upon these mitigation of loss and average loading findings and arrived at the sum of $12,838.31, for which a reparation order in favor of plaintiff was entered; that a copy of the reparation order was served upon defendants but that they had failed and refused to observe the order or make the payment therein required; that the mitigation of loss finding and the average loading finding, [fol. 93] as a result of which the damages sustained by plaintiff were reduced in the order of the Commission, were erroneous as a matter of law and were beyond the power of the Commission; and that plaintiff was entitled to judgment not only for the amount of the reparation order and interest, but also for such additional sum as would include the full damages which he had sustained.

The two reports and the reparation order of the Commission were attached as exhibits to the petition. The first report deals with the administrative questions as to whether a mine located on a single line of railway is entitled to rating as a two-road mine because of a trackage

agreement giving another line of railway access to the mines of a competitor, and as to whether a refusal to accord such mine the status of a two-road mine with right to order its full quota of cars from either road should be held discriminatory and prejudicial where it has been offered cars in the same proportion that they are furnished to its competitor. The Commission found the facts on all material matters to be virtually as alleged in the petition and answered both questions in the affirmative. The following quotations from the report of the Commission (112 I. C. C. 244) will show the nature of the administrative questions decided and the action of the Commission thereon:

"Defendants contend that a joint-mine status was not conferred upon the mines of the coal company, because of an understanding which they had with the coal company to the effect that its mines were not permitted to order cars in excess of 80 per cent and 20 per cent of their rating from the Maryland and B. & O., respectively. * * * In his complaint complainant prays, in part, that defendants be required to accord to his mine treatment in service, cars, and rates to his mine similar to that accorded the mines of the coal company. Defendants contend that complainant was offered the same arrangement but he declined and cannot, therefore, be heard to complain. Whether or not this is true and whether or not similar service was in fact offered complainant depends upon surrounding circumstances.

* * * * * * *

[fol. 94] "It is clear from the above and other evidence of record that the arrangement whereby the coal company's car supply would be furnished by the Maryland and B. & O., respectively, in the proportion of 80 and 20 per cent was adapted to the needs of the coal company based upon their past shipments. It is also clear that the arrangement was the result of conference and agreement with the president of the coal company. Similar consideration was not given complainant, but he was advised that cars would be supplied by both carriers only in the proportion of 80 and 20 per cent, as was done with the coal company. Can it then be said that the complainant was not subjected to undue disadvantage?

* * * * * * *

"It is well established that a mine served by two roads enjoys advantages not possessed by a mine served by only one road. The reasonable enjoyment of these advantages should be protected. We think also that carriers may not, by withholding their equipment or facilities, dictate or control the markets which a particular shipper shall seek or enjoy, while adapting their services to the needs of a competing shipper. * * * By fixing the proportion of car supply which the coal company would be furnished by the respective carriers in conformity with its customary shipments and after conference with the president of the coal company these advantages were made available to the coal company. When fixing the proportion of car supply which would be furnished by the respective carriers to complainant like consideration was not given, but he was offered arbitrarily and without regard for the requirements of his business that which had been arranged for his competitor after deliberation. Such service would not have been similar or on a basis of equality between the shippers. The complainant was subjected thereby to undue and unreasonable disadvantage Under the circumstances complainant should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads. Upon all the facts of record we find that the acts and practices [fol. 95] of defendants whereby they accorded Maryland service to the mines of the West Virginia Coal & Coke Company located on the Coalton branch of the B. & O. during the period from October 14, 1922, to April 1, 1923, while failing to accord similar service to complainant's mine located intermediate thereto resulted in undue prejudice to complainant in the matter of car supply."

The second report dealt with the question of plaintiff's damage. 152 I. C. C. 327. It found that plaintiff "in fact ordered a 100 per cent supply of cars from the Western Maryland, but since that defendant would not honor his requisitions on that basis, he also placed his orders with the B. & O."; that he was entitled to receive from the Western Maryland 818.1 cars during the period in question, but actually received only 5 cars from the Western Maryland

and 367.8 from the B. & O.; that the cars furnished were loaded with an average of 53.35 tons; that the figures upon which plaintiff claimed loss of $57,735.11 were not questioned; that defendant's contention that plaintiff's mine was excessively rated would not be sustained in the absence of showing as to the ratings of other mines in the district; and that the amount claimed by plaintiff as damages would be reduced only because of the mitigation of loss finding and the average loading finding to which we have heretofore referred. With respect to these the report states:

"Complainant's mine was being served exclusively by the B. & O. He desired to order cars from the Western Maryland, and through verbal and written communications the matter was brought to the attention of B. & O. and Western Maryland officials. Complainant was informed that his competitors on the B. & O. Coalton branch were ordering 20 per cent of their car supply from the B. & O., and 80 per cent from the Western Maryland, and that a division of his orders on that basis would be acceptable. This proposition was rejected, as complainant desired to place orders for car supply with either or both carriers as he saw fit. At the hearing on damages, a witness for complainant denied that his mine was offered the 20-80 basis, but the con- [fol. 96] trary is clearly and repeatedly shown by testimony of the same witness at the first hearing.

* * * * * * *

"It is a familiar rule that a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss. United States v. F. & G. Co., 236 U. S. 512; Warren v. Stoddart, 105 U. S. 224; Western Real Estate Trustees v. Hughes, 172 Fed. 206; Hall v. Paine, 112 N. E. 153. That principle is applicable here. By reasonable action on his part in accepting defendants' 20-80 offer, complainant could have increased his production to the extent of 1,825 tons in October, 1,940 tons in November, 3,960 tons in December, 4,950 tons in January, 2,545 tons in February, and 1,485 tons in March. To this extent his damage was due to his own action and defendants cannot reasonably be expected to compensate him therefor. Complainant also erred in computing the tonnage that he could have produced, if he had been allowed to avail himself of the Western Mary-

land's car supply, by using an average loading of 53.55 tons per car. Under the rules 50 tons is used in determining the daily car rating and is likewise used in the rules governing distribution to coal mines. Making the latter correction, the profit per ton, if complainant had been permitted to order 100 per cent of his rating from the Western Maryland, would have been as follows: * * *."

It is clear from this statement that the question as to the sufficiency of the petition to support the judgment divides itself into three minor questions: (1) whether the petition alleges a cause of action upon which suit may be maintained; (2) whether the petition shows that plaintiff sustained damages to the amount adjudged in his favor; and (3) whether, in any event, plaintiff should not be limited in his recovery to the amount awarded by the Commission in its reparation order. We shall consider these questions in the order named.

On the first question, defendants contend that no cause of action is alleged because plaintiff was not entitled to Western Maryland car service, and, even if so entitled, was not prejudiced because the Coal & Coke Company was re- [fol. 97] stricted to the 80-20 arrangement offered plaintiff. We think it clear, however, that plaintiff attacked before the Commission the rule or practice of the carriers, and not merely the discriminatory enforcement of a rule, and that consequently the Commission was called upon to prescribe the standard of service that should have prevailed and that its administrative powers were invoked under section 15 of the Interstate Commerce Act, and not merely its quasi judicial powers. P. R. R. Co. v. Puritan Mining Co., 237 U. S. 121, 131; Morrisdale Coal Co. v. P. R. R. Co., 230 U. S. 304, 313; Powers v. Cady, 9 Fed. (2d) 458, 459. In such cases, the rule is well settled that we are bound by the action of the Commission. Mitchell Coal & Coke Co. v. P. R. R. Co., 230 U. S. 247, 258; Morrisdale Coal Co. v. P. R. R. Co., supra; U. S. v. L. & N. R. Co., 235 U. S. 314, 320-1. If, however, the questions raised be considered as questions of law which the courts have a right to review, we are satisfied, for the reasons given by the Commission, that its action thereon was correct. 112 I. C. C. 244. See also St. Louis S. W. R. Co. v. U. S., 245 U. S. 136, 144; U. S. v. P. R. R. Co., 266 U. S. 191, 197, 199.

On the second question, the contention of defendants is that the petition and attached reports of the Commission show that the deductions made by the Commission on account of its mitigation of loss finding and its average loading finding were properly made and that plaintiff is, therefore, not entitled to recover more than the amount of the award of the Commission. We may eliminate the average loading finding from consideration, as verdict and judgment are for an amount less than the damage claimed by more than the amount of the average loading deduction. As to the mitigation of loss finding, this is based upon the findings contained in the report of the Commission, which are admittedly based upon conflicting evidence, and not upon any facts alleged in the petition. Questions with regard thereto were thus raised to be passed upon by the jury in the light of the evidence, but there was nothing in the petition itself which required the deduction.

But even if the facts contained in the report of the Commission be considered as incorporated in the petition, we think that it clearly appears that the deduction on account [fol. 98] of the diminution of loss finding was erroneous as a matter of law. Plaintiff had a right to order 100 per cent of his car supply from the Western Maryland. It appears that he actually did order same in accordance with this right and that defendants wrongfully refused to recognize his requisitions. The fact that they offered to furnish him less than he was entitled to receive does not excuse their default or diminish his right to damages. It is true that it is the duty of one who is injured by another's breach of contract to use every reasonable effort to diminish his damages. But plaintiff did all that he was required to do when he placed orders for the cars to which he was entitled with the Western Maryland and upon failure to get them filed requisitions with the B. & O. and accepted all cars that were tendered him by both railroads. It was not incumbent on him to accept an offer of less than he was entitled to receive from the Western Maryland. Its offer of the 80-20 basis did not preclude it from furnishing the cars to which he was entitled when he made requisitions for them; and the responsibility for his damage rested not upon him but upon it. It is unthinkable that a party in default should escape liability for damages by attempting to force the other party to accept part performance as a condition to any perform-

ance at all. A party under contract to deliver 100 bales of cotton, for example, might diminish damages by proof that the other party could have purchased the cotton on the market at the time the contract was breached; but no court would seriously entertain the contention that damages should be diminished because he offered to deliver fifty bales in discharge of his liability to deliver a hundred.

We come then to the third question, which is the real question of the case, viz., was plaintiff precluded from recovering an amount greater than that awarded him by the Commission? Defendants base their contention upon Section 9 of the Interstate Commerce Act as amended (49 U. S. C. A. 9) which provides:

"Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own [fol. 99] behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *."

Their contention is that to allow plaintiff to sue for a greater amount than awarded by the Commission would be to allow him to sue in the courts for his claim after invoking the action of the Commission, which is in violation of the provisions of the section quoted. Reliance is based upon Standard Oil Co. v. U. S., 283 U. S. 235, in which the holding was that suit might not be brought in the courts on a claim after unsuccessful application to the Commission. The complete answer to this contention, we think, is that plaintiff's application to the Commission was not unsuccessful and his suit is not brought under Section 9. On the contrary, his application under Section 9 resulted in an award in his favor which defendants refused to pay. Suit was then instituted under Section 16(2) of the Act (49 U. S. C. A. 16(2)), which provides:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the com-

plainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless [fol. 100] they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

There is nothing in this section which limits the plaintiff to the amount awarded by the Commission. On the contrary, he is required to set forth "the causes for which he claims damages" as well as the order of the Commission; and it is provided that the suit shall proceed in all respects as other civil suits for damages, except that upon the trial of same the findings and order of the Commission shall be prima facie evidence of the facts therein stated. Not only does the general language of the section thus provide for the trial of the cause for which damages are claimed just as other civil actions are tried, but the effect of the findings and order of the Commission are limited in the exception to prima facie evidence. The question of interpretation is a typical one for the application of the maxim, "the exception proves the rule".

It is to be borne in mind that we are not dealing with a case where the Commission has denied relief in an application under Section 9, nor with a case where defendants have offered compliance with the order of the Commission and tendered payment thereunder. In such cases different considerations may well apply. But the case with which we are dealing is one where defendants have refused to comply with the Commission's order and it has been

necessary for plaintiff to institute suit under Section 16(2) to obtain relief. In such case we think it clearly the intention of the statute that the order with which defendants refused to comply should not limit the rights of plaintiff to any greater extent than it does those of defendants. As said by Judge Dickinson in Minds vs. Pennsylvania Railroad Company, 237 Fed. 267, 268, 270:

"After an order has been made by the Interstate Commerce Commission in favor of a complainant shipper against a railroad carrier for the payment of a damage award, proceedings brought in court because of the refusal of the carrier to comply with the order are properly for [fol. 101] the damages sustained by the complainant (limited to the amount set forth in the pleadings), and such proceedings are de novo, and the damages are to be found by the jury under all the evidence, including the findings of the Commission, which are made evidence by the acts of Congress. * * * If this language of the statute is taken at its face value, and the action regarded as one for damages, the whole proceeding is simplified. If the view now presented by the defendant is taken, a host of baffling queries rush upon the mind. The obstacles which shut out this view may be summed up in the observation that, if such be the law, the defendant is given the undeserved advantage of being in a position in which it may gain, but cannot lose, and all it risks in this speculation are costs and counsel fees."

And we agree with the following language of the same judge in Hillsdale Coal & Coke Co. v. P. R. R. Co., 237 Fed. 272, 275:

"If to paraphrase the language of Congress, this action, to which the act of the defendant has driven the plaintiff, is treated in all respects as an action for damages, except that all the findings of the Commission are made evidence, etc., all or nearly all troubling questions are eliminated. If the action is regarded as one to enforce the findings of the Commission, and they are further regarded as binding upon the plaintiff, but open to any attack by the defendant, then a veritable legal chaos reigns.

"It will be seen to follow that in such final action the administrative findings must (as in the case of a first

action at law) conclude everybody and settle the administrative facts. The facts to be found by the jury must be open ones to the defendant, and (at least may) be alike open to the plaintiff. The simplest view which might be taken of such a proceeding is that it is to be tried (with the exceptional features noted) precisely as the action for damages would have been tried, had the plaintiff gone first to the Commission to determine the administrative facts, and then brought his action; the administrative findings included in the report being treated as such preliminary findings. This would, however, open to the plaintiff the [fol. 102] opportunity to go beyond the cause of action presented to the Commission, and would be inconsistent with some of the provisions of the act of Congress. All such inconsistencies disappear, however, if the proceedings are treated as in the nature of appeal procedings, taking into court only the original complaint or cause of action presented to the Commission, but otherwise de novo, except for the evidentiary and other features ingrafted upon it by Congress, and with the administrative features conclusively established by the findings of the Commission, and the juridical facts open to be established by any otherwise proper evidence, and to be found under all the evidence, in the body of which is embraced the findings of fact by the Commission."

The Supreme Court in Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 430, thus interprets the prima facie clause of Section 16 (2) of the Statute:

"This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents."

In P. R. R. Co. v. Clark Bros., 238 U. S. 456, the Supreme Court, in holding that suit might not be brought in a state court while action was pending before the Commission, and that plaintiff might not seek treble damages under a state statute after invoking the provisions of the Interstate Commerce Act, but was bound by the provisions of that act, clearly intimated that the findings of the Commission as to the amount of damages were not binding on the plaintiff in

a suit instituted under Section 16 (2) of the act. The Court said at pages 472 and 473:

"The federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commissioner's finding, that statute determined

[fol. 103] the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court and there to secure treble damages under the state statute with respect to the same transactions. *This is not to say that the finding of the Commission as to the amount of damages has any other effect than that prescribed in section sixteen of the Act.* It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practiced, was then entitled to proceed for the recovery of damages in accordance with the Act, and not otherwise." (Italics ours.)

A case supporting the conclusion that a plaintiff is not bound by the finding of the Commission on the issue of damages in a case such as this is, Penn. R. Co. v Weber, 257 U. S. 85, a case which first appears in the reports of the Supreme Court as P. R. R. Co. v. Jacoby, 242 U. S. 89. In that case the plaintiff asked only the amount of damages awarded by the Commission. The Supreme Court on the first appeal reversed a judgment of the court below on account of the use of an erroneous basis of calculation by the Commission. Upon a subsequent trial of the cause plaintiff recovered the original amount by the introduction of additional evidence as to damages, and this was sustained by the Supreme Court on the second appeal. The importance of the decision lies in the fact that, although the damages awarded by the Commission could not be sustained, plaintiff was allowed to recover the full amount of his damages upon evidence which established the damages upon a different basis from that upon which the Commission had acted. See 269 Fed. 111 and 263 Fed. 945.

The conclusion at which we have arrived seems not only to me compelled by the language of the statute, but also to be the necessary interpretation if grave injustice is to be averted. Although Section 9 gives a right to resort to

the courts as an alternative to resort to the Commission, this right cannot be availed of by a shipper in a case such as this until he has secured an administrative determination by the Commission of the rule upon which his rights de- [fol. 104] pend. Penn. R. Co. v. Clark Coal Co., 238 U. S. 456, 469. If, as here, this administrative determination is delayed beyond the statutory limit for bringing suit, he must recover his damages before the Commission or not at all. If, in such case, errors of the Commission in the computation of damages could not be corrected in suit brought in the courts upon failure of the carrier to comply with the order of the Commission, the shipper would be without remedy. It is true that this reasoning would apply in cases where the Commission refuses to award damages as well as in a case such as this; but the adverse decision of the Commission on an administrative matter would be decisive on the shipper in all events. It is in cases where the administrative questions are decided with the shipper, and the Commission erroneously decides questions affecting the amount of damages against him, that injustice is likely to result.

The case before us is an apt illustration of what we have in mind. Plaintiff could not have gone into court without obtaining from the Commission an administrative determination of the questions upon which his right of recovery depended. When he obtained this determination, more than two years had elapsed and it was too late to go into court. 49 U. S. C. A. 16(3); Phillips Co. v. Grand Trunk Western Ry. Co., 236 U. S. 662. He had to proceed before the Commission or not at all. The Commission decided the administrative questions in his favor and found that he had sustained damage in the amount which he claimed, but refused to award damages in this amount because of what we conceive to be an utterly erroneous view of the law as to diminution of damages. Defendants refused to pay even the amount awarded, and plaintiff was compelled to institute this suit under Section 16. It seems to us that to deny him the damages which he is in law entitled to recover because of the erroneous view of the Commission as to the law, is warranted neither by the language of the statute nor by any rule of law applicable in the premises. We certainly will not strain the meaning of the statute to effect what seems to us such an unjust result.

After the filing of the reparation order of the Commission, plaintiff sought to enjoin the enforsement of same in a suit filed in the Northern District of West Virginia and [fol. 105] heard before a specially constituted court of three judges. That Court, two members of which are members of this, denied the relief prayed on the ground that the Court was without power to grant same, but, noticing the contention of plaintiff that he stood in danger of irreparable injury, pointed out that in a suit for damages he would not be bound by the error of the Commission in limiting the award. What was said by the Court in that opinion is relevant here. (Brady v. Interstate Commerce Commission, 43 Fed. (2d) 847, 851-2.)

"And when we look to the nature of reparation orders and consider the provisions which have been made for their enforcement and for the correction at law of any errors which they may contain, the conclusion that they were not intended to be included among those which might be enjoined or set aside is irresistible. As said by Judge Woolley in Pittsburgh & W. V. Railway Co. v. United States, (D. C.) 6 Fed. (2d) 646, 648: 'An order of the Commission awarding reparation is not a cause of action. Nor is it in the nature of a judgment on which execution may issue. It is an award of money damages and is declared by statute to be evidence, and then only prima facie evidence, of the facts found by the Commission * * * to be used only as such in an action which may be instituted after default by a carrier to obey the order of payment.' It is not thinkable that it should have been intended that a court of three judges should be convened, with direct appeal from their action to the Supreme Court, to pass upon the validity of an order which amounts to no more than prima facie evidence.

"In case a reparation order is not complied with and no suit is brought by the person in whose favor it is made, it amounts to nothing and could not of course be the cause of irreparable injury justifying an injunction order. If suit is brought, it proceeds 'in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated.' 49 U. S. C. A., sec. 16

(2). As said by the Supreme Court in Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 430, 35 S. Ct. 328, 335, 59 L. Ed. 644, Ann. Cas. 1916B, 691, the section of the statute making these prima facie evidence 'cuts off no de- [fol. 106] fense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury.' If, therefore, the carrier deems the order erroneous, it has full opportunity to correct the error or defend against it upon the trial. Pittsburgh & W. V. Ry. Co. v. U. S., supra. If the party in whose favor it is made is not satisfied with it, he may in instituting his suit set forth the cause of action for which he claims damages, and the order of the Commission, and have his case proceeded with 'in all respects like other civil suits for damages,' except that on the trial the findings and order of the Commission shall be prima facie evidence of facts therein contained. There is nothing in the act, we think, which limits his recovery to the amount awarded by the Commission, and there is no reason why the recovery should be so limited. The order and findings of the Commission are prima facie evidence, just as is the report of an auditor in an action at law. Ex Parte Peterson, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919. And there is no more occasion to limit the recovery in the one case than in the other. We are advertent to the fact that in Western N. Y. & P. R. R. Co. v. Penn. Refining Co., supra, there are expressions to the effect that recovery is limited to the amount awarded by the Commission; but we do not understand that this holding was necessary to the decision in that case and, at all events, we do not accept it as a correct statement of the law. Not only does the rule announced in the Meeker case, supra, conflict with it, but so also does the intimation in Penn. R. Co. v. Clark Coal Co., 238 U. S. 456 at pages 472, 473, 35 S. Ct. 896, 59 L. Ed. 1406. It is apparent, therefore, that no irreparable injury is to be apprehended from reparation orders of the Commission, that any errors therein may be corrected in the trial provided for by statute, and that resort to injunction to set aside such orders is not permissible."

For the reasons stated, we think there was no error in the judgment below and same is accordingly affirmed.

Affirmed.

[fol. 107] In United States Circuit Court of Appeals, Fourth Circuit

No. 3283

The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation, Appellants,

versus

A. Spates Brady, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia

Judgment—Filed and entered October 17, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Senior Circuit Judge.

October 17, 1932.

[fol. 108] In United States Circuit Court of Appeals

Petition of Appellants for Stay of the Mandate—Filed October 28, 1932

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Your petitioners, The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, appellants herein, respectfully represent that on the 17th day of October, 1932, this honorable Court entered a judgment herein, affirming the judgment of the United States District Court for the Northern District of West Virginia; that the mandate has not yet been issued, but will be issued in ac-

cordance with the rule of this Court, unless the issue thereof shall be stayed.

Your petitioners further represent that they intend to, and will, apply to the Supreme Court of the United States for a writ of certiorari to review said judgment of this Court; that they are drafting a petition for said writ of certiorari and have requested the Clerk of this Court to prepare a certified copy, and the additional copies, of the record required by the rule of said Supreme Court; that said petition will be based upon the grounds, among others, that there was error in awarding judgment to A. Spates Brady, appellee herein, for an amount in excess of that awarded by the reparation order of the Interstate Commerce Commission, with interest thereon, and in failing and refusing to effectuate the rule requiring the plaintiff to use or avail himself of reasonable means to minimize loss or damages, whereby his loss or damages would have been reduced to the amount of said Commission's said reparation order; that this Court has decided an important question of Federal law arising under the Interstate Commerce Act, which has not been, but should be, settled by said Supreme Court, or has decided a Federal question arising under said Interstate Commerce Act in a way probably in conflict with applicable decisions of said Supreme Court.

Your petitioners further represent that said petition for a writ of certiorari is being prepared with all speed consistent with careful regard to the rules and decisions of said Supreme Court, and your petitioners believe that said [fol. 109] petition will be filed in said Supreme Court within thirty days, or less, and they are using every reasonable effort to file the same within much less than said thirty days; that your petitioners, however, are unable to state the period within which said Supreme Court will decide whether or not said writ of certiorari should be issued, and if issued, the period of time within which said Supreme Court will decide said cause, and issue its mandate; that said petition for a writ of certiorari will be filed and this application for a stay of the issuance of the mandate is made, not for delay, but in order that justice may be done.

Your petitioners further represent that the judgment of said District Court, appealed from, was for the sum of sixty-three thousand and forty-eight dollars and sixty cents

($63,048.60), with interest from the 7th day of August, 1931, until paid; and that in said Court your petitioners, with good and sufficient surety, gave a supersedeas bond in the penalty of seventy-five thousand dollars ($75,000), conditioned for prosecuting their appeal to effect, answering the whole amount of said judgment, and all damages and costs, which bond was duly approved by said Court.

Your petitioners therefore pray that issue of the mandate herein may be stayed until said Supreme Court shall decide whether or not said writ of certiorari should be issued, and if issued, until said Supreme Court shall decide this cause and issue its mandate, or for such other reasonable time as this Court may deem just, and that they may have such other and further order as the premises may require. And your petitioners will ever pray, etc.

The Baltimore and Ohio Railroad Company, Western Maryland Railway Company, Appellants and Petitioners, by George M. Hoffheimer, of Their Counsel. George M. Hoffheimer, Charles R. Webber, Eugene S. Williams, E. A. Bowers, Counsel for Appellants and Petitioners.

[fol. 110] *Duly sworn to by George M. Hoffheimer. Jurat omitted in printing.*

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed October 28, 1932

Upon the application of the appellants, by George M. Hoffheimer, Esq., their counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above case be, and the same is hereby, stayed pending the application of the appellants in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

John J. Parker, Senior Circuit Judge.

October 28, 1932.

[fol. 111] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 112] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,223. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 526. The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, petitioners, vs. A. Spates Brady. Petition for a writ of certiorari and exhibit thereto. Filed November 25, 1932. File No. 37,223.